BEFORE THE
NATIONAL LABOR RELATIONS BOARD
REGION 2

ST. ANTHONY COMMUNITY HOSPITAL,	)	
Respondent,	)	**NLRB Case No. 02-CA-278511**
v.	)	**Administrative Law Judge Benjamin W. Green**
1199SEIU UNITED HEALTHCARE WORKERS EAST,	)	
Charging Party.	)	

POST-HEARING BRIEF OF RESPONDENT ST. ANTHONY COMMUNITY HOSPITAL

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The Respondent, St. Anthony Community Hospital ("Respondent" or "SACH"), of Warwick, New York, respectfully requests that the National Labor Relations Board ("NLRB" or "Board"), Division of Judges dismiss the amended complaint brought by Region 2 of the NLRB ("Region"), based on charges filed by the 1199SEIU United Healthcare Workers East ("Union"). The General Counsel did not present sufficient evidence at the hearing to carry its burden of proof that SACH engaged in any unfair labor practice. The record does not demonstrate that any SACH supervisor unlawfully interrogated any employee about union activities or that SACH terminated Andrea Roe ("Roe") in retaliation for, or to otherwise discourage, union activity at SACH. The General Counsel failed to establish that SACH had knowledge that Roe participated in any protected activity prior to her discharge, or that SACH management demonstrated any anti-union animus. Moreover, even if the General Counsel could meet its *prima facie* burden, the record demonstrates that SACH terminated Roe for unauthorized access to a patient's medical records and unauthorized disclosure of a patient's protected health information in violation of HIPPA. For these reasons, SACH requests that the Administrative Law Judge dismiss the charges in their entirety.

STATEMENT OF THE CASE

St. Anthony Community Hospital is a non-profit hospital located in Warwick, New York. SACH is a part of the Bon Secours Charity Health System ("BSCHS"), along with the Good Samaritan Regional Medical Center in Suffern, New York, the Bon Secours Community Hospital in Port Jervis, New York, and a number of other long and short-term care facilities, assisted living facilities, and other off-site medical programs. BSCHS is owned and controlled by the Westchester Medical Health System ("WMHS"), which oversees compliance and labor relations for the BSCHS. The WMHS has a history of amicable bargaining with multiple different unions,

and several WMHS hospitals are currently parties to various collective bargaining agreements, including with the Union.

In early 2021, the Union launched a campaign to organize technical employees at SACH. The Respondent disseminated information and communicated its position encouraging employees to vote against the Union, in accordance with Board rules and precedent. On April 28, 2021, the WMHS Compliance Department received a complaint from the spouse of a SACH patient, alleging that SACH x-ray technician, Andrea Roe, had made an improper and unauthorized disclosure of the patient's protected health information to her mother-in-law. The WMHS Compliance Department conducted an investigation of the complaint that confirmed Roe had accessed the patient's medical records without authorization or an apparent business reason, and had violated HIPPA by disclosing the patient's protected medical information to her mother-in-law, Donna Roe. As a result of these violations, SACH discharged Andrea Roe on May 14, 2021.

On June 10, 2021, the Union filed an unfair labor practice charge against SACH, alleging that SACH officers unlawfully interrogated unnamed employees about their support for the Union, and that SACH suspended and ultimately terminated Andrea Roe in retaliation for her union activities in violation of the National Labor Relations Act ("NLRA"). On November 24, 2021, the Region issued a complaint and notice of hearing, which it amended on December 9, 2021 and again on March 2, 2022 (hereinafter "Complaint"). The Complaint alleged that SACH violated (1) Section 8(a)(1) of the NLRA when the BSCHS Director of Radiology, Robert Yates, allegedly interrogated employees about the union activities of other employees; and (2) Section 8(a)(1) and Section 8(a)(3) of the NLRA by terminating Andrea Roe in alleged retaliation for, and to discourage, union activity and membership by SACH employees. SACH filed an answer to the

first amended complaint on December 23, 2021, and an amended answer on March 16, 2022, denying all substantive violations and asserting affirmative defenses (hereinafter "Answer").

The Board held a two-day virtual hearing before Administrative Law Judge Benjamin Green on March 29 and March 31, 2022.[1] At the conclusion of the hearing, Judge Green set May 5, 2022 as the deadline to file post-hearing briefs. The Respondent St. Anthony Community Hospital respectfully submits this post-hearing brief in accordance with Judge Green's deadline and requests that the Judge dismiss the Complaint in its entirety.

FACTUAL ISSUES PRESENTED

After a full and complete hearing, the following are the key factual issues presented in this proceeding:

1. Did Robert Yates, then the BSCHS Director of Radiology, unlawfully interrogate SACH employees about their union activities in April 2021?

2. Did the relevant decision-makers have knowledge of Andrea Roe's alleged union activity prior to SACH's termination of her employment on May 14, 2021?

2. Was Andrea Roe's alleged union activity a motivating factor in SACH's decision to terminate her employment?

3. Would SACH have terminated the employment of Andrea Roe for violations of SACH policy even in the absence of the alleged union activity?

SUMMARY

The factual record in this matter establishes that the managers involved in the decision to terminate Roe had no knowledge of Roe's union activities or sympathies, did not exhibit any anti-union animus, and terminated Roe's employment for legitimate, non-discriminatory reasons. The record demonstrates:

[1] References to the parties' Joint Exhibits are cited as "JE", General Counsel's Exhibits are cited as "GC", Respondent's Exhibits are cited as "RE", and references to the Hearing transcript are cited as "Tr. [page]".

- The WMHS Compliance Department received a complaint on April 28, 2021 from the wife of a patient at a WMHS facility, Christine Faline, alleging that Andrea Roe breached HIPPA by disclosing the patient's protected health information to her mother-in-law, Donna Roe. Donna Roe knew confidential details about the patient, including his COVID-19 status and that he had been transferred from SACH to Westchester Medical Center.
- Valerie Campbell, the Regional Vice President for Corporate Compliance at WMHS, instructed Samantha Molleda, the Director of Corporate Compliance at BSCHS, to conduct an investigation into the alleged HIPPA breach by Andrea Roe. Molleda ordered a HIPPA access audit on April 28, 2021 that revealed Roe had accessed the patient's medical records on April 15, 2021 without any apparent business purpose.
- As part of the investigation, Molleda reviewed Roe's access to the medical records of other patients to identify the types of documents Roe typically accessed during the course of her duties as a radiology technician, as well as all of the imaging orders and tests conducted by the Radiology Department for the patient during the relevant time period. Molleda also consulted with Roe's supervisor, Robert Yates, the Director of Radiology for the BSCHS, to determine if Roe was involved in the patient's care and would have had a legitimate reason to access the patient's records on April 15.
- On May 4, 2021, Molleda met with Roe, Yates, SACH Senior Human Resources Manager, Yvonne Capone, and Roe's friend and co-worker, Jeanne Saeli. During the meeting, Molleda informed Roe of Faline's complaint and the results of the HIPPA access audit. Roe denied disclosing the patient's protected health information to Donna Roe, but was unable to provide an explanation for why she accessed the patient's medical chart on April

15. All she could offer were hypothetical scenarios that might require her to access the records, without any reason for why she actually accessed the records on April 15.

- After a more thorough review of the relevant documentation, including the most recent radiology imaging orders and the types of documents accessed by Roe on April 15, Molleda, Campbell, Roe, Yates, Capone and Saeli met again later the same day. During the second May 4 meeting, Campbell reviewed the HIPPA access audit with Roe in detail, identifying the various documents accessed by Roe on April 15, including the storyboard summary, a patient summary, an after-visit summary, and clinical notes that included lab results. A number of these records did not appear to be documents typically consulted by a radiology technician in the scope of a technician's duties. Roe was again unable to provide an explanation for why she accessed any of these records.
- On May 7, Campbell and Molleda participated in a teleconference with Capone, Kim Hirkaler, the BSCHS Senior Director of Human Resources Operations, Patrick Schmincke, the BSCHS Chief Operating Officer, Anita Volpe, SACH Vice President and Hospital Administrator, and Barbara Kukowski, the deputy general counsel for the WMHS, to review the findings of the Compliance Department's investigation. Campbell and Molleda informed the group that they had determined that Roe had accessed the patient's medical records on April 15 without a business purpose and disclosed the patient's protected health information to Donna Roe in violation of SACH's HIPPA and unauthorized access policies.
- After a review of the type of discipline imposed in prior cases involving serious HIPPA violations, Campbell and Molleda recommended that Roe be terminated, consistent with prior practice in the WMHS. The rest of the participants on the May 7 call agreed that the

severity of Roe's HIPPA violations merited termination. At least three other employees at WMHS facilities had been terminated for serious HIPPA violations over the three preceding years, including Kathy Taylor, who was discharged for similarly serious violations involving both unauthorized access and a disclosure of patient protected health information. Cases involving both unauthorized access and disclosure are deemed more serious because they indicate an intentional breach of HIPPA.

- Roe was notified of her termination by Capone and Yates on May 14. Yates had no role in the decision, but informed Roe of the discipline as her direct supervisor. Both Capone and Yates testified that they were unhappy that Roe was being discharged, and had expressed support for Roe during the investigation process.
- On June 10, 2021, the Union filed the instant unfair labor practice charge, alleging that Roe was terminated in retaliation for her Union organizing activities, and that Yates had unlawfully interrogated employees about the Union activities of other employees.
- None of the WMHS, BSCHS and SACH officials involved in the decision to terminate Roe's employment were aware of Roe's Union activities or sentiments. Although Roe alleged that she called into a video call to count the Union ballots on April 30, Capone testified that she was not aware that Roe was on the call. Although Roe alleged that she told Yates that the technicians needed the Union to secure better pay and benefits, Yates did not view Roe as a Union supporter and, regardless, was not involved in the termination decision. The General Counsel failed to introduce sufficient evidence to establish the employer knowledge element of its *prima facie* case under *Wright Line*, 251 NLRB 1083 (Aug. 27, 1980).

- None of the relevant decision-makers exhibited any anti-union animus. Capone expressed support for Roe throughout the investigation and unhappiness at Roe's discharge. The timing of Roe's termination was precipitated by a third-party complaint wholly unrelated to Roe's Union activities. Further, WMHS facilities, including SACH, have a longstanding history of amicable bargaining with unions, including the Union at other facilities. The General Counsel failed to establish the anti-union animus and nexus element of its *prima facie* case.
- Because the General Counsel failed to establish the employer knowledge and anti-union animus elements of its *prima facie* case by a preponderance of the evidence, the Complaint must be dismissed. However, even if the General Counsel had established its *prima facie* case, the Complaint must still be dismissed because SACH satisfied its burden to show that it would have terminated Roe even in the absence of any Union activity. Roe was terminated as a result of a thorough investigation initiated by a third-party complaint, and conducted in a manner that was completely unrelated to any Union activity by Compliance officials unaware of Roe's Union activities or sympathies.

- **STATEMENT OF RELEVANT FACTS**

A. General background.

1. St. Anthony Community Hospital is a non-profit hospital located in Warwick, New York.[2] SACH is a part of the Bon Secours Charity Health System, along with the Good Samaritan Regional Medical Center in Suffern, New York, the Bon Secours Community Hospital in Port Jervis, New York, and a number of other long and short-term care facilities, assisted living

[2] Tr. 116.

facilities, and other off-site medical programs.[3] BSCHS is owned and controlled by the Westchester Medical Health System, which oversees compliance and labor relations for the BSCHS, including for SACH.[4]

2. Yvonne Capone was employed by SACH as the Senior Human Resources Manager, and served as an agent of Respondent pursuant to Section 2(13) of the NLRA, during all times relevant to the Complaint.[5] Capone has worked in SACH's human resources department since 1997, and as the Senior Human Resources Manager, was responsible for coordinating labor relations for SACH, among other human resources functions.[6] Capone reported to Kim Hirkaler.[7]

3. Kim Hirkaler was employed by the BSCHS as the Senior Director of Human Resources Operations, and served as an agent of Respondent pursuant to Section 2(13) of the NLRA, during all times relevant to the Complaint.[8]

4. Robert Yates was employed by the BSCHS as the Director of Radiology, and served as a supervisor of Respondent pursuant to Section 2(11) of the NLRA and an agent of Respondent pursuant to Section 2(13) of the NLRA, during all times relevant to the Complaint.[9] As the BSCHS Director of Radiology, Yates split his time between the facilities at SACH, Good

[3] Tr. 116; Tr. 121-22; Tr. 208.

[4] Tr. 116; Tr. 118-19; Tr. 216-17; Tr. 228.

[5] Answer ¶ 5; Tr. 206.

[6] Tr. 207.

[7] Tr. 207.

[8] Answer ¶ 5; GC 2, ¶ 19; Tr. 207.

[9] Answer ¶ 5; Tr. 249.

Samaritan Regional Medical Center, and the Bon Secours Community Hospital, and typically worked at SACH 1-2 days per week (Tuesdays and Fridays).[10] Yates retired from BSCHS on August 6, 2021, and is now employed at the Garnet Health Medical Center.[11]

5. Samantha Molleda was employed by the BSCHS as the Director of Corporate Compliance, and served as an agent of Respondent pursuant to Section 2(13) of the NLRA, during all times relevant to the Complaint.[12] As the Director of Compliance, Molleda oversaw investigations of potential compliance violations at the BSCHS, including complaints alleging violations of the Health Insurance Portability and Accountability Act of 1996 ("HIPAA").[13] As of July 2021, Molleda is no longer employed by the BSCHS.[14]

6. Patrick Schmincke was employed by the BSCHS as the Chief Operating Officer, and served as an agent of Respondent pursuant to Section 2(13) of the NLRA, during all times relevant to the Complaint.[15]

7. Valerie Campbell was employed by the WMHS as the Regional Vice President for Corporate Compliance, and served as an agent of Respondent pursuant to Section 2(13) of the

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[10] Tr. 249.

[11] Tr. 248-49.

[12] Answer ¶ 5; Tr. 121.

[13] Tr. 128; *see also* JE 7. SACH and other WMHS facilities have an obligation to comply with HIPPA and are subject to regulatory oversight by the United States Department of Health and Human Services, the Office of Civil Rights. Tr. 122. These obligations include investigating potential HIPPA breaches. *Id*.

[14] Tr. 122.

[15] Answer ¶ 5; GC 2, ¶ 19; Tr. 145.

NLRA, during all times relevant to the Complaint.[16] As the Regional Vice President of Corporate Compliance for the WMHS, Campbell oversaw and coordinated investigations of potential compliance violations in the WMHS, including allegations of HIPPA violations.[17]

8. Anita Volpe was employed by SACH as the Vice President and Hospital Administrator during all times relevant to the Complaint.[18]

B. WMHS' history of amicable collective bargaining.

9. The WMHS, including BSCHS facilities and SACH specifically, have a longstanding history of amicable and successful bargaining with unions, including the Union at other locations.[19]

10. In addition to a collective bargaining agreement ("CBA") with the Union for the technical unit, SACH also has a CBA with the Union for the service unit, and a CBA with the New York State Nurses Association ("NYSNA") for the registered nurses ("RN") unit.[20] The RNs successfully unionized at SACH and elected NYSNA as their collective bargaining representative in the summer of 2020, before the Union began its efforts to unionize the technical unit at SACH.[21]

[16] Answer ¶ 5; GC 2, ¶ 19; Tr. 120-21.

[17] Tr. 121.

[18] Tr. 215.

[19] Tr. 116; Tr. 208.

[20] Tr. 207; Tr. 250.

[21] Tr. 44-45.

11. Both the Bon Secours Community Hospital and the Good Samaritan Regional Medical Center have long-standing collective bargaining relationships with the Union.[22] Similarly, both the MidHudson Regional Hospital and the HealthAlliance Hospital have collective bargaining agreements with the Union.[23] Each of these hospitals are a part of the WMHS, which oversees and coordinates labor relations and collective bargaining for all WMHS facilities.[24]

12. SACH agreed to conduct its union elections, including the Union election for its technical employees, via consent election agreements with the union, which were approved by the NLRB.[25] There is no evidence in the record to suggest that SACH ever deviated from the election agreements. There is further no evidence in the record suggesting that SACH failed to bargain with the Union or NYSNA in good faith.

13. Aside from this proceeding, there is no evidence in the record of any complaint, grievance or unfair labor practice charge alleging that SACH or any other WMHS facility engaged in discrimination or retaliation on the basis of any employee's membership in or participation in union activities, or engaged in any other unfair labor practice.

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[22] Tr. 208; *see also* Tr. 49 ("[Anthony Peterson, a Union official] had said that they just got the union -- they had just gotten the union voted in at another hospital close by and now would be a great time to kind of keep that ball rolling and, you know, get going with St. Anthony's.").

[23] Tr. 116; GC 5, at SACH0001170 (noting that the Union represents employees at "Good Sam, Bonn Secours, MidHudson Regional, Health Alliance").

[24] Tr. 121-22; Tr. 208.

[25] Tr. 115 ("This was a consent election… the parties worked with the Board and 1199 to come up with the unit."); Tr. 208 (Capone confirming that SACH agreed to an election with the Union for the technical employees); GC 8, at SACH0000136-40 (sample consent agreement).

C. SACH had no knowledge of Roe's union organizing activities during the Union's campaign to organize the technical employees at SACH.

14. After the RNs unionized at SACH in the summer of 2020, some of the RNs suggested that the technical workers could "piggyback" off NYSNA and elect their own union.[26] Andrea Roe spoke with two RNs in the fall of 2020, who offered to put her in contact with the Union so that she could ask some questions and explore the possibility of unionizing the technical workers.[27] Roe agreed to let the RNs pass on her phone number to the Union.[28]

15. These conversations occurred in the area of Roe's Radiology Department, including in an adjacent hallway and in the CAT scan room.[29] There is no evidence in the record to suggest that any SACH supervisor was present during these conversations, or was in a position to overhear. There is no evidence in the record that Roe ever informed management about these conversations or that management ever became aware that she had such conversations.

16. At some point in the fall of 2020, Roe had a phone call with a Union official, Anthony Peterson, who provided her with background information on the Union and the steps that the technical employees would need to take to unionize.[30] Roe intentionally contacted him separately instead of responding to his group text, to keep her interest in the Union private.[31]

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[26] Tr. 44-45.

[27] Tr. 45-46.

[28] Tr. 46.

[29] Tr. 45.

[30] Tr. 46-47.

[31] Tr. 46.

17. Following her conversation with Peterson, in the fall of 2020, Roe spoke with approximately 15-20 of the technical employees in her Radiology Department at SACH to gauge their interest in unionizing.[32] In around January 2021, Roe spoke with approximately 3-5 technical workers in other departments at SACH, including some OR and respiratory technicians, to gauge their interest in unionizing.[33] Towards the end of the Union's campaign, Roe also spoke with some service workers at SACH about the possibility of the service unit unionizing.[34] There is no evidence in the record to suggest that any SACH supervisor was present or nearby during any of these conversations, or that management ever became aware that Roe had such conversations.[35] Roe conceded as much on cross-examination.[36]

18. Towards the end of January or the beginning of February 2021, the Union began holding regular video calls over Zoom with technical employees interested in unionizing.[37] Roe called into these meetings from her home.[38] Approximately 5-10 technical employees typically joined these meetings, most of whom also called in from home, after work hours.[39] There is no

[32] Tr. 49.

[33] Tr. 49-50.

[34] Tr. 51-52.

[35] Tr. 85 (Roe confirming that she did not know if any supervisors ever became aware of her conversations with others in relation to union organizing).

[36] Tr. 85 (Roe conceding that she did not know if anyone from management was aware of her conversations related to union organizing).

[37] Tr. 52.

[38] Tr. 52.

[39] Tr. 52.

evidence in the record to suggest that any SACH supervisor ever attended these Union meetings or otherwise became aware that Roe participated in such meetings.[40]

19. In early April 2021,[41] Roe had a conversation about the Union campaign with her supervisor, Robert Yates, who announced to the staff that he was available to speak if anyone wanted to discuss the Union.[42] Roe and another technician, Karen Heller, volunteered that they would like to talk about the Union and joined Yates to discuss in the CAT scan room.[43] During the conversation, Roe allegedly told Yates that she felt that they needed a union because she thought that a union could provide the technical workers with "better benefits, better pay, better staffing."[44] However, Roe did not tell Yates if she would vote for the Union, and he did not ask.[45] Yates testified that, while he "viewed [Roe] as someone who was considering options,… [he] never thought that she was a [Union] supporter."[46]

[40] On one occasion, an OR technician called into a Union meeting from SACH, but Roe "couldn't tell" if there were any supervisors nearby. Tr. 52.

[41] Roe was out on leave for the first three weeks of March 2021. Tr. 53-54.

[42] Tr. 54.

[43] Tr. 54-55.

[44] Tr. 55.

[45] Tr. 257 ("I didn't know how she going to be voting").

[46] Tr. 257; Tr. 266.

20. Yates had no knowledge that Roe was helping organize for the Union, or engaging in any Union activities.[47] There is no evidence in the record that Yates ever became aware of Roe's organizing activities.[48]

21. On April 30, 2021, Roe joined a Microsoft Teams video call during which the ballots for the Union election were counted.[49] There were approximately 10-15 people on the call, including Union representatives and SACH's Human Resources Manager, Yvonne Capone.[50] Roe did not speak during the call and kept her video turned off, but alleged that her name was visible if a participant clicked on the participant list.[51] Capone kept her video off as well, but Roe saw her name on the participant list after she clicked on it to see who else was on the call.[52] Capone testified that she did not see Roe's name on the call.[53]

22. Capone did not become aware that Roe supported the Union or that she participated in Union organizing activities until approximately two weeks after Roe was discharged.[54] On May

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[47] Tr. 257 (Yates confirming that he had "no" knowledge that Roe was "helping to organize for 1199").

[48] Jeanne Saeli testified that she had "no idea" whether Yates knew that Roe supported the Union, and confirmed that she never informed Yates that Roe was the "ringleader" leading the organizing drive. Tr. 23-24. Roe also testified that she did not know whether Yates was aware of her union activities. Tr. 86.

[49] Tr. 56-57.

[50] Tr. 57-58.

[51] Tr. 58; Tr. 86-87 ("you could see, like -- depending on what you clicked on. I clicked on to see, like, everybody that was there. So I could see the people that had their cameras on").

[52] Tr. 58; Tr. 87.

[53] Tr. 209 ("I do not recall seeing [Roe's] name" on the April 30, 2021 ballot count video call).

[54] Tr. 211 (Capone confirming that she did not know that Roe was a "union supporter" or a "union organizer" during the Union's campaign); Tr. 222-23 (about two weeks after Roe's termination on

24, 2021, Capone received an email from Kim Hirkaler, who was on the phone with the Union, and informed Capone that the Union was alleging that SACH terminated Roe because of her organizing efforts.[55] Capone responded: "OMG, I did not know she was an organizer…"[56]

23. There is no evidence in the record to suggest that any other SACH, BSCHS or WMHS manager became aware of Roe's union activity or sentiments until after she was terminated, when the Union filed the charge in this proceeding.[57]

D. SACH's efforts to campaign against the Union were permissible and appropriate.

24. On March 4, 2021, the Union filed a representation petition with the NLRB ("Petition"), a copy of which was sent to Alan Liebowitz, the WMHS Vice President of Labor Relations.[58]

25. After receiving the Union's Petition on or around March 4, 2021, SACH management began to distribute flyers to the technical workers communicating its position regarding the Union's campaign and encouraging the workers to vote against the Union.[59] These

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May 14, Capone learned from Hirkaler that Roe had been involved in the Union organizing effort); Tr. 222 ("I would've never in my life thought that Andrea Roe would've been [a union organizer]").

[55] RE 3 (May 24, 2021 email).

[56] RE 3. Capone explained that, while she had an inkling that Roe may have been involved with the Union when she showed up to the May 14 meeting with a Union representative, Krystal Shorette, she did not become aware of Roe's union activities until Hirkaler informed her of the Union's claims on May 24. Tr. 225-26; RE 3.

[57] Tr. 148-49 (Campbell noting that a union was never mentioned in her meetings about Roe's compliance violations and that she learned about the unfair labor practice charge from HR sometime after Roe was terminated).

[58] GC 6, at SACH0000387-91.

[59] Tr. 53; Tr. 229; *see generally* GC 4, at SACH0000839-41, 844-45 (March 17, 2021 flyers); SACH0000869-71 (March 24, 2021 flyers); Tr. 274 (Yates explaining that he "brought the [flyers] to each department, ultrasound. And then, if somebody were tied up, I would -- I would make sure I dropped the document off and just say, if there's any questions, let me know.").

flyers generally provided information about some of the benefits of a non-union workplace and some of the detriments of a unionized workplace, but did not make any promises or threats.[60]

26. In addition to handing out flyers, SACH supervisors let employees know that they were available if they wanted to discuss the Union campaign, but did not require any employees to participate in any such conversations.[61] Human Resources trained SACH supervisors on the "Do's and Don'ts" of what was permissible and what was prohibited under the NLRA during a union campaign, including guidance for what may be permissibly discussed during voluntary, one-on-one meetings between managers and employees wishing to discuss the union campaign.[62] As a part of this training, managers were instructed that they could not "interrogate" any employees about their union sympathies, activities or intention to cast a vote for the union.[63]

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[60] GC 4, at SACH0000839-41, 844-45 (March 17, 2021 flyers); SACH0000869-71 (March 24, 2021 flyers).

[61] GC 5, at SACH0000141-42 ("While it is lawful to have one on one discussions with employees, those discussions should be voluntary. So, it is fine if the employee approaches you and it is fine if you ask them if they would like to talk about the election. But requiring them to speak, or otherwise talking to them in what may be viewed as in a coercive manner (cornering them, coming into office) could be unlawful"); *see also* Tr. 54 ("I remember Bob [Yates] going around and saying today's the last day, you know, that we're allowed to talk to you about the union. Does anybody want to talk, does anybody want to talk.").

[62] Tr. 209-11 (as part of SACH's response to the Union campaign to organize the technical employees, Human Resources met with managers and the leadership team "to educate them on the dos and don'ts of -- during a union campaign"); GC 5, at SACH0000219 (noting that a meeting was held on April 9, 2021 where the "some dos and don'ts were shared with the leaders"); GC 7, at SACH0001100-06 (Do's and Don'ts in a Union Organizing Drive handout distributed to managers); GC 8, at SACH0000141-42 (email from Capone emphasizing permissible practices).

[63] GC 7, at SACH0001104 (noting that supervisors may not "[q]uestion employees about their union views, activities, or sympathies"); GC 8, at SACH0000141-42 (reminding supervisors that they could not "interrogate" or ask employees questions about "how an employee is going to vote, or whether or not they support the union"); Tr. 211 (Yates confirming that, as a part of the training, he was instructed that supervisors could not "interrogate" employees about their views regarding unions).

27. Throughout the Union campaign in March-April 2021, Yates had multiple voluntary, friendly conversations with Jeanne Saeli during which they discussed the Union.[64] They discussed topics ranging from union dues, salary and wages, and the culture of the organization.[65] Saeli alleged that she told Yates that she believed that the Union "would be a very good thing for us" and that, throughout our conversation, she got the impression that Yates was "not a fan" of the Union.[66] Saeli admitted that she was never "disciplined or subject to any adverse treatment" because she made these statements supporting the Union.[67]

28. Saeli further alleged that, during one conversation in April 2021, Yates asked her "who the [Union] ringleader was."[68] Saeli alleged that, while she believed that Roe led the Union organizing effort for the technical employees, she did not tell Yates because she "didn't want to get her in trouble."[69] Yates denied that he ever asked Saeli about the "ringleader" of the Union campaign.[70] In fact, Yates testified that he "never really cared who the ringleader was" and that he "never really thought about that."[71]

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[64] Tr. 253-54. Yates and Saeli had a "friendly relationship" and spoke frequently. Tr. 254; Tr. 23 (Saeli confirming that she had "a good relationship" with Yates). In fact, Yates hired Saeli at SACH "many years ago." Tr. 253.

[65] Tr. 254.

[66] Tr. 13.

[67] Tr. 23.

[68] Tr. 13.

[69] Tr. 13-14.

[70] Tr. 254 ("No, that…didn't happen. I never -- I never really cared who the ringleader was. I never really thought about that. No, I never asked her that.").

[71] Tr. 254.

29. Yates began his voluntary conversation with Roe and Heller in early April 2021 by asking them "what do you want to talk about?"[72] When Roe asked him his opinion about the Union, Yates said that he believed that SACH "was better off…negotiating directly with the employees" and that SACH "preferred that the hospital remain Union free."[73] Roe alleged that he shared his belief that the Union "took your money and they gave you nothing in return."[74] Yates testified that he made sure that all of his comments were "within the boundaries of the dos and don'ts" on which he was trained by SACH.[75] Although Roe allegedly told Yates that she disagreed, and that she felt that the Union was needed because it might help employees obtain additional pay and benefits, Roe testified that "in the end of the conversation, we basically agreed to disagree."[76] Yates made no promises or threats during the discussion.

30. In accordance with the parties' consent election agreement, the ballots were mailed out to employees on April 2, 2021 and had to be returned by April 23, 2021.[77]

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[72] Tr. 95 ("He had said, like, you know, do you want to talk about the Union? I said I would talk about the Union. So I said, you know, what are your -- he said, what do you want to talk about? And I said, well, you know, what are -- what do you want to talk about?").

[73] Tr. 252; Tr. 271.

[74] Tr. 55.

[75] Tr. 271-72.

[76] Tr. 95-96.

[77] GC Ex. 3, SACH 0000208-210.

31. The ballots were counted during a video call on April 30, 2021, with the Union receiving a majority of the votes and subsequently being certified as the collective bargaining representative for the technical workers at SACH.[78]

E. Christine Faline's complaint against Andrea Roe for breach of HIPPA.

32. On April 28, 2021, Valerie Campbell received a phone call from Christine Faline, the wife of a patient who was admitted at SACH, and subsequently Westchester Medical Center (the "Patient").[79] Faline told Campbell that on April 27, 2021, Faline went to a local chiropractor's office in Warwick, New York, and the receptionist who worked there, Donna Roe, asked her unusually specific questions about COVID-19, including whether Faline had COVID-19 and whether she had recently been tested for COVID-19.[80] When Faline asked Donna Roe why she was asking her all of these questions, Donna Roe responded that she knew that Faline's husband was being treated at SACH, and that her daughter-in-law, an x-ray technician named Andrea Roe, was "keeping her updated on his status."[81] Faline also told Campbell that Donna Roe said that she knew that the Patient had been transferred to Westchester Medical Center.[82]

33. Faline testified that Donna Roe greeted her by name when she entered the chiropractor's office, and asked her whether she was "tested regularly at the hospital" for COVID-19.[83] When Faline communicated that she did not understand, Donna Roe told her that she knew

[78] Tr. 56-58 (noting that the Union received a majority of the votes at the April 30 ballot count).

[79] Tr. 125-26; JE 5, at SACH0000741; Tr. 196 (Faline confirming that she made a complaint to Campbell the day after her conversation with Donna Roe).

[80] Tr. 125-26; JE 5, at SACH0000741.

[81] Tr. 127; JE 5, at SACH0000741.

[82] JE 5, at SACH0000741.

[83] Tr. 192.

that Faline worked at the hospital.[84] Faline informed her that she was vaccinated, and at that time Donna Roe yelled to the chiropractor in the back office, and within earshot of other patients and another receptionist, "it's okay; she's vaccinated."[85] Faline was perplexed, so Donna Roe explained to her:

> I know that your husband is in the hospital. I know that he has COVID. And I said, excuse me? And she said at that point that her daughter-in-law worked at St. Anthony's, and she had been updating her on his condition…And I said, what -- you know, what -- what do you mean? She said, oh, well, I -- you know, I know your mother-in-law and my husband knows your husband. So I said, oh, okay. So my -- my mother-in-law told you about my husband, his condition? And she said, no, my daughter-in-law is an X-ray tech at St. Anthony's. She has been updating me on his status, on his condition. And I said, who is your daughter-in-law? And she said, Andrea Roe.[86]

34. Faline was "horrified" that Donna Roe had discussed her husband's personal medical information so flippantly in front of other patients in the waiting room.[87] She complained to the chiropractor,[88] and the next day called the WMHS Compliance Department to report a breach of HIPPA.[89]

35. Upon receiving the complaint from Faline on April 28, Campbell contacted Samantha Molleda and instructed her to open a HIPPA breach case and conduct an investigation of Faline's complaint to determine if Andrea Roe had violated SACH's policies governing

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[84] Tr. 192.

[85] Tr. 192.

[86] Tr. 193.

[87] Tr. 195.

[88] Tr. 193.

[89] Tr. 195-96. Faline had been a nurse for almost 29 years and was familiar with HIPPA obligations. Tr. 195.

HIPPA.[90] SACH's policies governing HIPPA are addressed in the WMHS Compliance policy titled Use and Disclosure of Patient Information[91] and the BSCHS Code of Conduct.[92] All SACH employees receive annual HIPPA training.[93]

36. On April 28, 2021, Molleda submitted a request to SACH's IT department for a HIPPA access audit to identify any improper access to the Patient's records.[94] The access audit identified all instances when Roe electronically accessed the Patient's medical records from February 1 – April 29, 2021.[95] The access audit necessarily included a review of any care provided by Roe to the Patient (e.g., her involvement in any tests or imaging for the Patient that would have reasonably required Roe to access relevant medical data).[96]

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[90] Tr. 128; JE 5, at SACH0000741.

[91] JE 4.

[92] JE 3, at SACH0001403. In addition, BSCHS's Standards of Conduct policy identifies an intentional disclosure of a patient's protected health information as a "major violation" that will subject an employee to "severe disciplinary actions", including termination of employment. JE 16.

[93] Tr. 20-21; Tr. 84 (Roe confirming that she received annual HIPPA training and understood her obligation to not disclose protected patient health information under HIPPA); Tr. 191.

[94] JE 8 (April 28 request for HIPPA access audit; JE 1 (HIPPA access audit); *see also* Tr. 129 (an access audit is typically the first step in a compliance investigation of a potential HIPPA breach).

[95] JE 1; Tr. 129 ("So we work with [IT] team. They're able to pull an accounting of all of [Roe's] access into medical records. So it will show us every keystroke that the individual made into a medical record. Every -- every area they looked at, whether, you know, it be clinical information, demographic information. But it gives us an accounting of all of the information that the individual accessed while -- during that time period.").

[96] Tr. 130 ("So what the Information Technology department does is they compare her access to any care that she provided to a patient to determine if there may be areas of inappropriate access for us to investigate further.").

37. The audit showed that Roe had accessed the Patient's records on multiple occasions during the relevant time period, but Molleda and Campbell determined that the majority of the access appeared appropriate and consistent with her work duties[97]—except that there appeared to be no apparent business reason for Roe's access of the Patient's medical records on the morning of April 15, 2021.[98] The access audit revealed that Roe accessed documents indicating the Patient's diagnosis, status, lab results and clinical notes input by the Patient's healthcare providers, but did not appear to be involved in providing any care to the Patient at that time that would have required such access.[99] Although the Radiology Department processed several imaging orders for the Patient from April 3-21, including a test at 2:25-2:40 AM on April 15, 2021, it did not appear that Roe was involved in assisting with any of those tests.[100] Indeed, Roe did not start her shift until

[97] Tr. 131 ("on April 5th, the only thing that was accessed was a -- a patient checklist probably indicating any patients on there that may have needed any type of radiology imaging. Same thing with April 11th."); Tr. 132 ("And then on April 19th, again, you see that this patient appeared on a -- on a list that she must have accessed in the -- probably in the regular course of her business.").

[98] JE 1 (HIPPA access audit); JE 2 (Roe did not appear to have processed any of the Patient's imaging orders around April 15); Tr. 132 ("When IT did their analysis, they were not able to determine that there was any care being provided [by Roe] at that time. And as we explained to everyone, if you go into a medical record, there must be a business purpose to access that information. So we -- when we were looking at April 15th, we saw significant access and no care provided that she was involved with this patient.").

[99] Tr. 131-32 ("On April 15th, there was considerable more…additional access…Ms. Roe went into the patient's record, viewed the storyboard, which is an accounting, a snapshot of really what's going on with the patient at that time. On that storyboard, you can see the patient's basic information, diagnosis, what the status of the patient is, where they're located in the hospital, just a -- a brief snapshot of what's going on with the patient. But then continues to go further into the patient to view notes throughout the -- throughout the patient's chart as well as lab results …"); Tr. 171 ("So she goes into patient clinical info, and then she goes into clinical notes. And then there is, I believe, two, four, six different clinical notes that she reviews. And she goes into orders, as well, and I believe one of these orders was for lab work."); JE 9, at SACH0000707 (Roe accessed the Patient's chart notes, ICU notes, and a patient summary on April 15).

[100] JE 1; JE 2 (List of radiology orders and tests conducted for the Patient around the time of Roe's access to Patient's records and Molleda's hand-written notes).

8:00 am the following morning, on April 15, hours after the test had already been completed, indicating that there would have been no need for her to access the Patient's records in connection with the ongoing imaging order.[101]

38. On May 4, 2021, Molleda reached out to Roe's supervisor, Robert Yates, to determine if Roe may have had some work-related reason for accessing the Patient's records on April 15.[102] Specifically, Molleda wanted to ensure that Roe was not involved in a XR Chest Port imaging order scheduled for 2:25 AM on April 15, 2021 (and completed by 2:40 AM) the night prior Roe's access to the Patient's medical records on the morning of April 15.[103] Yates responded that Roe was not involved in any of the imaging orders or appointments for the Patient that occurred around the time of Roe's access of the Patient's medical records.[104]

39. In addition to reviewing the access audit, Molleda also interviewed Faline on May 4, 2021 to ask her for additional information.[105] Molleda had a number of follow up communications with Faline throughout early May 2021.[106]

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[101] JE 2 (Molleda's hand-written notes indicated that Andrea was not on duty at the time that the test was conducted from 2:25-2:40 AM on April 15); Tr. 140 ("the physician completed and electronically signed off of the order at 4 a.m. So this test was -- was completed at that point, which indicated to us that there was no involvement by Ms. Roe in this radiology exam").

[102] JE 17; Tr. 136.

[103] JE 6 (April 15, 2021 XR Chest Port imaging order); Tr. 139-40.

[104] JE 17.

[105] JE 5, at SACH0000739.

[106] Tr. 199.

40. After an initial review of the HIPPA access audit, an interview of Faline, and after consulting with Yates, Molleda invited Roe to a meeting at 1:00 PM on May 4 to discuss Faline's complaint and the potential unauthorized access to the Patient's medical records.[107] Aside from Roe and Molleda, the meeting was attended by Capone, Yates, and Roe's friend and fellow radiology technician, Jeanne Saeli.[108] During the meeting, Molleda informed Roe that Compliance had received a complaint from the wife of the Patient alleging that Roe had breached HIPPA confidentiality by sharing the Patient's protected health information (e.g., his COVID-19 status) with her mother-in-law, Donna Roe.[109]

41. During the 1:00 pm May 4 meeting, Roe admitted that Donna Roe was her mother-in-law and that she worked at a local chiropractor's office, that she did not know the Patient personally but that she did know his sister and some of his family members, and that at a recent family gathering she recalled that her father-in-law mentioned that he heard the Patient had contracted COVID-19.[110] However, Roe denied ever informing her mother-in-law that the Patient had COVID-19, or that she kept her regularly updated about his medical condition, and could not provide an explanation for why Donna Roe would have made such statements to Faline.[111]

42. Molleda next informed Roe that a HIPPA access audit showed that Roe had electronically accessed the Patient's medical chart on the morning of April 15, including various

[107] JE 9, at SACH0000706-08 (May 4, 1:00 pm meeting summary).

[108] JE 9, at SACH0000706-08 (May 4, 1:00 pm meeting summary).

[109] Tr. 25; Tr. 61-62; JE 9, at SACH0000706-08 (May 4, 1:00 pm meeting summary).

[110] Tr. 61-62.

[111] Tr. 61-62.

chart and clinical notes that appeared unrelated to radiology, and asked if Roe could explain why she accessed this information.[112] Roe said that she did not remember accessing the Patient's medical records on April 15, and that she could not recall processing any imaging order for the Patient on or around April 15 that would have required her to access his medical records.[113] Saeli and Roe noted that radiology technicians might access a patient's chart for various reasons even if they are not personally responsible for processing the patient's imaging order, including when requested to do so by physicians, RNs, or radiologists involved in the patient's care, to assist another technician in closing out the imaging order on the system, or to review a prior scan before beginning an imaging order.[114] Yates agreed that a technician might need to access a patient's medical chart, even if not directly involved in the patient's care, under the hypothetical scenarios offered by Roe and Saeli.[115] Molleda agreed to look into these matters further and the meeting concluded.[116]

43. After the 1:00 pm meeting, Molleda updated Campbell, and they conducted a more thorough review of all of the x-rays and radiology exams completed for the Patient on or around April 15 to see if they could identify any reason why Roe might have accessed the Patient's

[112] Tr. 14-15; Tr. 63; JE 9, at SACH0000706-08 (May 4, 1:00 pm meeting summary).

[113] Tr. 63 ("I said I don't remember."); Tr. 90 ("I said I didn't even know if I had [accessed Patient's medical records], but if I had, I couldn't remember why").

[114] Tr. 15; Tr. 63-64; JE 9, at SACH0000706-08 (May 4, 1:00 pm meeting summary).

[115] Tr. 63-64; Tr. 259-60.

[116] Tr. 64.

medical records.[117] They also reviewed the specific records she accessed, so as to better understand the reason for reviewing such documents.[118] Finally, they had a call with IT to review the types of documents she regularly accessed and any patterns in Roe's access of medical records during the regular scope of her duties.[119]

44. At 4:00 pm on May 4, Campbell, Molleda, Yates, Capone, Saeli and Roe met again to review the additional information that Molleda and Campbell had collected.[120] Campbell reviewed the HIPPA access audit with Roe in detail, asking her about her access to various portions of the Patient's medical record, including the storyboard summary, a patient summary, an after-visit summary, and various clinical notes.[121] Roe could not provide an explanation for why she accessed any of these records.[122] Campbell informed Roe that Compliance had not been able to

[117] Tr. 139 ("We did a little deeper dive to determine when the last X-rays or any radiology exams were performed and if she was involved in any of those -- any of those treatments to determine if that may have been why there was access into the medical records."); Tr. 140-41; JE 2.

[118] Tr. 260 (Molleda asked Yates whether the specific records accessed included information that a radiology technician would typically need to review to do their job).

[119] Tr. 158 ("We reviewed her access of that day with the IT department and had a little bit of discussion with them to just take a look at her patterns of access and the types of things that she accessed.").

[120] JE 9, at SACH0000703-05 (May 4, 4:00 pm meeting summary).

[121] Tr. 14 ("They showed us printouts of clicks in the medical record that Andrea clicked in the patient's chart."); Tr. 26-27; Tr. 65-66 (Roe confirming that Campbell reviewed the HIPPA access audit raw data with her, showing the various documents that Roe had clicked on in the Patient's medical records); Tr. 91 (Roe confirming that Campbell reviewed the HIPPA access audit with her, including access to the storyboard, a patient summary, an after visit summary, and the generation of a report); Tr. 142; JE 9, at SACH0000703-05 (May 4, 4:00 pm meeting summary).

[122] Tr. 90 ("I said I didn't even know if I had, but if I had, I couldn't remember why [I had accessed these records]"); Tr. 142 (confirming that Roe had no explanation for why she accessed these specific portions of the Patient's medical chart).

find any imaging order or test that would have required her to access these records.[123] Campbell reviewed the radiology imaging orders and tests conducted for the Patient during the relevant time period, including the chest port imaging order scheduled conducted from 2:25-2:40 AM on April 15, but Roe did not indicate that she was in any way involved with any of these procedures.[124] Campbell also explained that several of the records accessed by Roe did not appear related to radiology and would not typically be accessed by an x-ray technician during the course of an x-ray technician's regular work duties.[125] Roe had no explanation for any of this, and despite her insistence that it was possible that someone else involved in the Patient's care might have asked her to access his records, she was unable to provide any names or details of who might have called her or requested that she access the Patient's records on the morning of April 15.[126]

45. At the conclusion of the 4:00 pm meeting on May 4, because Roe could not provide a sufficient explanation for the alleged HIPPA breach and unauthorized access to the Patient's

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[123] Tr. 16 ("[Campbell] talked about how Andrea was in this person's chart but there was no direct correlating exam that Andrea did."); JE 9, at SACH0000703-05 (May 4, 4:00 pm meeting summary).

[124] Tr. 27-28; Tr. 68; JE 9, at SACH0000703-05 (Roe could not recall a reason why she would have accessed the records).

[125] Tr. 143 ("Based on the areas of the record that [Roe] accessed, this -- this doesn't appear to be or didn't appear to be the things that would be normally accessed by a radiology indivi -- someone in the radiology department or a radiology tech or a radiology staff person. Looking at lab results -- you know, there are certain things that they may look at, but based on the access, this was not things that were consistent with areas that -- of the record that would be accessed in order to perform any type of radiology test."); Tr. 177 ("From what Ms. Molleda shared with me, just that there was -- the -- the spots of the chart that she went into are not areas that he would have gone into."); Tr. 260-61 (Yates confirming that Molleda and Campbell indicated that the records accessed did not appear related to a radiology technician's job, including access to physician's notes).

[126] Tr. 75 ("I said, I could not remember specifically, like, who called me that day or why I had to click into [the Patient's record on April 15].").

records, SACH suspended her pending further investigation.[127] This suspension was consistent with Compliance's practice to suspend an employee under investigation for a HIPPA breach.[128]

46. Following the second May 4 meeting, Compliance reviewed Roe's access to the medical records of other patients on April 15, 2021 and determined that her access to the medical records of the Patient was not consistent with her access of the patient records of other patients during the course of her regular work duties on April 15.[129]

47. At the conclusion of the investigation, the Compliance Department made a determination, finding that:

> In summary, it was determined [Roe] inappropriately accessed the patient's medical record on 4/15/21 and we believe the patient's PHI was disclosed to her mother-in-law. The patient's information was inappropriately accessed on 4/15/21 between 8:25AM and 8:26AM. Upon review of the access audit and corresponding imaging orders for the patient, it was determined [Roe] had no business purpose/clinical reason to access the patient's chart.[130]

F. Andrea Roe was terminated for unauthorized access and breach of HIPPA.

48. On May 7, 2021, Campbell, Molleda, Capone, Kim Hirkaler, Anita Volpe, Patrick Schmincke and Barbara Kukowski, deputy general counsel for the WMHS, participated in a

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[127] Tr. 69 ("Capone then spoke, and said that they would need to do a further investigation, and that I would be suspended."); Tr. 215 ("So Andrea was suspended without pay pending investigation on the 4th.").

[128] Tr. 215 ("So normally when there is a PHI disclosure, our practice has been consistent that we would go ahead and suspend the employee pending the outcome of the investigation.").

[129] Tr. 144 ("We did a deeper dive to look at the access that Ms. Roe made into other patients during the course of that day to see if the access into this individual was consistent with that. In reviewing that, it appeared that the access was not consistent."); JE 7 ("A review was conduced on Andrea Roe's overall access into the medical record system on April 15, 2021. In summary, it was determined there was a pattern of appropriate access for all other patients she saw that day. The only outlier was the access made into [Patient's] medical record.").

[130] JE 14.

teleconference to discuss the Compliance team's investigation of Roe's alleged HIPPA breach and unauthorized access of the Patient's records.[131] Campbell and Molleda summarized the facts discovered during the investigation and their determination that Roe accessed the Patient's records without a business purpose on April 15 and subsequently disclosed the Patient's protected health information (e.g., his COVD-19 status) to Donna Roe at some point before April 27, 2021.[132]

49. The participants on the May 7 teleconference then discussed the appropriate level of discipline to impose for Roe's violation.[133] As a part of this discussion, the group considered the discipline imposed in prior cases involving a serious breach of HIPPA and unauthorized access to patient medical records, including the termination of another employee, Kathy Taylor, for similarly serious violations involving both a breach of HIPPA and unauthorized access.[134] Such violations are generally treated as more serious because they suggest an intentional disclosure of protected health information.[135] Although the severity of the discipline imposed in prior cases varied depending on the seriousness of the violation, WMHS facilities, including SACH, had

[131] Tr. 145-46; Tr. 215.

[132] Tr. 146, Tr. 216; JE 10.

[133] Tr. 146; Tr. 216.

[134] Tr. 216-217; Tr. 178 ("So we had a discussion, a review, similar cases that -- whether there was inappropriate access and/or access and disclosure. A few of those cases, we discussed…in instances where there was inappropriate access, these individuals were terminated. We did have an individual, Kathy Taylor, who, I recall -- who also works for the Charity System, who accessed and redisclosed information, and she was terminated, as well. And we discuss[ed] those similar cases when we meet as a group.").

[135] Tr. 179-80 ("So when we have information that points to the fact that there was inappropriate access into a medical record and then redisclosure, then that's considered intentional. And again, we take these things very, very seriously.").

terminated at least three employees in the three preceding years for serious HIPPA breach and unauthorized access violations.[136]

50. Collectively, the participants on the May 7 call determined that Roe's HIPPA violations were serious enough to warrant termination, and that a termination was consistent with prior discipline imposed for serious HIPPA violations.[137] Yates did not attend the May 7 meeting and was not involved in the termination decision.[138]

51. On May 11, 2021, Capone prepared a termination notification for Roe noting that her employment would be terminated for violation of SACH's HIPPA policies.[139]

52. On May 14, 2021, Capone and Yates met with Roe, with Roe's Union representative calling in by phone.[140] Capone shared a copy of the termination notice with Roe and informed her that the Compliance Department had determined that she had inappropriately accessed the Patient's medical record with no business purpose, including the Patient's ICU Notes, Patient Care Summary, and an After Care Visit Summary, and that she breached HIPPA by

[136] JE 13, at SACH0000073.

[137] Tr. 217 ("So knowing that there had been other cases, we agreed that this was serious enough to move forward with a dismissal from employment."): Tr. 146; Tr. 156-57 (the decision to terminate Roe was "a joint decision" by the participants on the May 7 call); JE 10 (May 7 teleconference summary).

[138] Tr. 216 (confirming Yates was not at the May 7 meeting and was not involved in the decision to terminate Roe, as "[n]ormally the manager will wait for HR and leadership team to get back to them to let them know [about the discipline imposed].").

[139] Tr. 217; JE 15.

[140] Tr. 221.

verbally disclosing the Patient's protected health information to her mother-in-law.[141] At her Union representative's advice, Roe refused to sign the termination notice.[142]

53. Both Yates and Capone were unhappy to terminate Roe.[143] Indeed, both had expressed support for Roe throughout the investigation process.[144]

54. Following Roe's termination, the Compliance Department conducted additional HIPPA training with the Radiology Department at SACH.[145] On June 18, 2021, Molleda sent out a breach notice to the Patient, as required by HIPPA, informing him that a SACH employee had inappropriately accessed his health information and may have disclosed his health information to a community member without his consent.[146] The Compliance Department also reported the breach to the Department of Justice, Office of Civil Rights, as required by law.[147] On July 6, 2021, Molleda drafted a final investigation summary and closed out the compliance matter.[148]

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[141] Tr. 78-79; Tr. 221-22; JE 15.

[142] Tr. 78; Tr. 222.

[143] Tr. 225-26 (Capone said that she was "extremely sick" to her stomach on May 14 because she had to terminate Roe, and it was "very difficult" to terminate her); Tr. 265 (Yates: "I was sad when she was fired. I mean, I -- that's not the outcome I was hoping for… I didn't want to see her terminated.").

[144] Tr. 85 (Roe confirming that Yates hired Roe and expressed support for her during the May 4 meeting); Tr. 94 (Roe confirming that Capone seemed supportive of Roe throughout the investigation).

[145] Tr. 181 ("So once we determine that an allegation is substantiated, we do education with the department just to, again, reeducate them and reiterate, you know, what's appropriate and would just give a HIPAA reeducation, is really what we do."); JE 14 ("HIPPA Education was conducted with the SACH Radiology Department in June 2021.").

[146] RE 1.

[147] RE 2.

[148] JE 7.

ARGUMENT

A. To Prevail on its Termination Claims, the General Counsel Must Establish a *Prima Facie* Case That Roe's Union Activity was a Motivating Factor in SACH's Decision to Terminate her Employment.

SACH has articulated a legitimate, non-discriminatory reason for why it terminated the employment of Andrea Roe on May 14, 2021. Accordingly, the termination claims in the Complaint must be analyzed under the burden-shifting framework set forth in *Wright Line*, 251 NLRB 1083 (1980), *approved in NLRB v. Transp. Mgmt. Corp*., 462 U.S. 393 (1983). *See NLRB v. Newark Elec. Corp*., 14 F.4th 152, 169 (2d Cir. 2021) ("In its *Wright Line* decision, the Board long ago established a two-step test for ascertaining whether an adverse employment action was taken because of union activity such that the action would violate section 8(a)(3)"); *United Rentals, Inc*., 350 NLRB 951 (2007) ("It is well established that 8(a)(3) allegations that turn on employer motivation are analyzed under *Wright Line*.").[149]

Under the *Wright Line*, the General Counsel bears the burden of proof to establish a *prima facie* case showing that the employee's protected activity was a "motivating factor" in the employer's adverse employment decision. *See Tschiggfrie Prop., Ltd.*, 368 NLRB No. 120, at *8 (Nov. 22, 2019); *Newark Elec. Corp.*, 14 F.4th at 169. To establish a *prima facie* case, the General

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[149] Although a termination based on an employee's protected activity violates both Section 8(a)(1) and Section 8(a)(3) of the NLRA, the NLRB and courts have traditionally analyzed both violations under the same framework. *See Metro. Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983) (noting that a violation of Section 8(a)(3) will always constitute "a derivative violation of § 8(a)(1)" and proceeding to evaluate discipline claims under the same Section 8(a)(3) framework); *S & S Enterprises, LLC d/b/a Appalachian Heating*, 370 NLRB No. 59, n.26 (Dec. 17, 2020) (applying the *Wright Line* test to a layoff decision that allegedly violated Section 8(a)(3) and 8(a)(1), and noting that "[a]s any conduct found to be a violation of Sec. 8(a)(3) would discourage employees' Sec. 7 rights, a violation of Sec. 8(a)(3) is also a derivative violation of Sec. 8(a)(1)."); *Dh Long Point Mgmt. LLC*, 369 NLRB No. 18 (Feb. 3, 2020) (applying the *Wright Line* test to discipline and termination claims brought pursuant to Section 8(a)(3) and 8(a)(1) charges).

Counsel must prove, by a preponderance of the evidence, that (1) the employer had knowledge that the employee was engaged in protected union activity and (2) the employer's decision to discharge the employee was motivated, at least in substantial part, by hostility toward that union activity. *NLRB v. Sprain Brook Manor Nursing Home, LLC*, 630 F. App'x 69, 71 (2d Cir. 2015); *David Saxe Prods., LLC*, 370 NLRB No. 103 (Apr. 5, 2021); *Tschiggfrie Prop.*, 368 NLRB No. 120, at *8.

In other words, as a part of its *prima facie* burden, "under *Wright Line* the General Counsel must establish that a causal relationship exists between the employer's animus toward the employee's protected activity and the employer's adverse action against the employee." *Tschiggfrie Prop.*, 368 NLRB No. 120, at *9. If, and only if, the General Counsel meets its *prima facie* burden, the burden then shifts to the employer to demonstrate "by a preponderance of the evidence that it would have reached the same decision absent the protected conduct, and thereby defend against liability." *Newark Elec. Corp.*, 14 F.4th at 169; *Tschiggfrie Prop.*, 368 NLRB No. 120, at *8.

The General Counsel has failed to establish the requisite knowledge and animus elements of its *prima facie* case. None of the evidence introduced by the General Counsel throughout the hearing established that the relevant decision-makers at SACH, BSCHS or WMHS were aware of Roe's Union organizing activities at SACH or her support for the Union prior to her termination. In fact, the record shows that the relevant decision-makers did not become aware of her Union activity until after she was terminated, when the Union alleged that her termination constituted an unfair labor practice. The General Counsel also failed to establish that anti-union animus played any role in the termination decision. The General Counsel has thus failed to meet its *prima facie* case burden, which is fatal to its case. However, even if the General Counsel had satisfied the

requisite knowledge and animus requirements of its initial burden, the evidence introduced at the hearing also established that SACH would have terminated Roe for a legitimate, non-discriminatory reason regardless of her participation in any protected activity. As such, the Complaint must be denied or dismissed in its entirety.

B. The General Counsel Failed to Meet Its *Prima Facie* Case Burden for the Termination Claims.

1. The relevant decision-makers had no knowledge of Roe's pro-union sentiments or her union activities at SACH.

To prevail on its claims, the General Counsel must prove that SACH knew about Roe's protected activity at SACH. *See Tschiggfrie Prop.*, 368 NLRB No. 120, at *4; *In re Cent. Plumbing Specialties, Inc.*, 337 NLRB 973, 975 (2002) (dismissing termination claim, in part, because the general counsel failed to present sufficient evidence to prove that the employer was aware of the employees' union activity); *Jo-Del, Inc.*, 324 NLRB 1239, 1243 (1997) ("The absence of evidence establishing knowledge by Respondent of any union activity or affiliation by [the terminated employee] precludes the finding of a violation of Section 8(a)(3) of the Act.").

It is axiomatic that union activity cannot be a "motivating factor" in the employer's termination decision if the managers who made the termination decision were not aware of the union activity. *See Sacramento Recycling & Transfer Station*, 345 NLRB 564, 565, 575 (2005) (dismissing termination claim based on finding that the decision-maker did not know about the employees' union organizing efforts); *In re Music Exp. East, Inc.*, 340 NLRB 1063, 1063-65 (2003) (same). In short, "[t]he employer-knowledge requirement entails proving knowledge on the part of the company official who actually made the discharge decision." *Gestamp S.C., LLC v. NLRB*, 769 F.3d 254, 262 (4th Cir. 2014) (collecting cases).

The General Counsel has failed to establish that the SACH, BSCHS and WMHS officials who made the decision to terminate Roe on May 7 had any knowledge of Roe's pro-Union activities or sentiments at the time that they made the termination decision.[150]

a. ***There is no direct evidence in the record that any of the relevant decision-makers were aware of Roe's protected activities prior to her termination.***

The General Counsel has presented no direct evidence demonstrating that any of the relevant decision-makers knew about Roe's Union organizing activities, affiliation or pro-Union sentiments. There is no evidence in the record demonstrating that Yvonne Capone, Kim Hirkaler, Anita Volpe, Patrick Schmincke, Valerie Campbell, Samantha Molleda, or Barbara Kukowski knew that Roe was a Union supporter, engaged in any Union organizing activities, or engaged in any other type of protected activities at the time that they participated in the May 7 teleconference during which they jointly decided to terminate Roe. As detailed further below, Capone testified that she had no knowledge of Roe's protected activities at the time of Roe's termination, and did not learn that she was a Union organizer until after the termination.[151] Campbell testified that there was no discussion or reference to Roe's Union activity or sentiments during the May 7 teleconference, or during the May 4 meetings with Roe to discuss the investigation.[152]

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[150] It is undisputed that Hirkaler, Volpe, Schmincke, Campbell, Molleda, Capone, and Kukowski jointly made the decision to terminate Roe's employment on the May 7 teleconference. *See* Tr. 145-47; Tr. 215-17 ("So knowing that there had been other cases, we agreed that this was serious enough to move forward with a dismissal from employment."); Tr. 156-57 (the decision to terminate Roe was "a joint decision" by the participants on the May 7 call); JE 10 (May 7 teleconference summary listing participants). While there may have been some further discussion of the termination decision with the VP of HR and the CEO for the BSCHS (Tr. 146), there is no evidence in the record to suggest that these officials needed to approve the termination, much less that they had any knowledge of Roe's protected activity.

[151] Tr. 211 (Capone did not know that Roe was a "union supporter" or a "union organizer" during the Union's campaign); Tr. 222-24 (Capone learned about Roe's organizing activities about two weeks after her termination).

[152] Tr. 148-49.

The General Counsel has presented no persuasive evidence to contradict this testimony. None of the General Counsel's witnesses testified that they ever informed any relevant decision-maker that Roe had engaged in any protected activity, or that any such decision-maker was otherwise aware of Roe's protected activities. None of the General Counsel's witnesses testified that any of the relevant decision-makers witnessed Roe engaging in any Union organizing activities, or were in a position to learn of such activities. The record is utterly devoid of any direct evidence of employer knowledge.

More fundamentally, it is undisputed that the Compliance investigation of Roe's HIPPA breach was initiated when Campbell received a complaint from a third-party, Christine Faline, on April 28, 2021.[153] There is no evidence to suggest that either Faline or anyone in the Compliance Department at WMHS or BSCHS had knowledge of the Union's organizing drive at SACH, much less that Roe engaged in any Union activity.[154] Neither Campbell nor Molleda worked from SACH, and neither was involved in SACH's campaign to encourage its technical employees to vote against the Union.[155] Tellingly, the General Counsel presented no evidence whatsoever to suggest the Campbell or Molleda had any knowledge of Roe's protected activities.

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[153] Tr. 125-26; JE 5, at SACH0000741; Tr. 196 (Faline confirming that she made a complaint to Campbell the day after her conversation with Donna Roe).

[154] Tr. 197 (Faline was not aware of the Union campaign at SACH).

[155] Tr. 87-88 (Roe had never met Campbell or Molleda, and Campbell had to drive from another facility to attend he May 4 meeting).

b. ***The fact that Capone participated in the April 30 ballot count teleconference does not establish that she had knowledge of Roe's protected activities.***

Roe alleged that she saw Capone's name on the April 30, 2021 Microsoft Teams ballot count video call, which included approximately 10-15 other participants.[156] Roe alleged that Capone kept her video off throughout the call, but that Roe recognized her name on the participant list after Roe clicked on it to see who else was on the call.[157] Roe did not speak during the call and kept her video turned off as well.[158] Capone testified that she did call into the April 30 ballot count video call, but that she did not see Roe on the call.[159] Roe's testimony is insufficient to establish, by a preponderance of the evidence, that Capone learned about Roe's protected activity during the April 30 call. There is no evidence, for example, that Capone clicked on the participant list and saw Roe's name. It is entirely possible that Capone participated in the April 30 call without noticing that Roe was also on the call. Mere suspicion or speculation by Roe that Capone ***may have*** noticed her name on the call is insufficient evidence to satisfy the General Counsel's *prima facie* burden under *Wright Line*.

> At the outset, we note that our inquiry does not involve an attempt to pinpoint the most reasonable motivation for an employee's discharge, for it is well-established that an employer may discharge an employee for good reason, bad reason, or no reason at all. Rather it is the General Counsel's burden to establish a particular motivation on the part of the employer, a discriminatory motivation. Because company knowledge of union activity is a fundamental prerequisite in the establishment of that motivation, it is also the General Counsel's burden to prove

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[156] Tr. 57-58.

[157] Tr. 58; Tr. 87.

[158] Tr. 58 (Roe's video was turned off); Tr. 86-87 ("you could see, like -- depending on what you clicked on. I clicked on to see, like, everybody that was there. So I could see the people that had their cameras on").

[159] Tr. 209 ("I do not recall seeing [Roe's] name" on the April 30, 2021 ballot count video call).

by substantial evidence the existence of such knowledge. ***Suspicion surrounding the discharge will not replace the need for such proof.***

Bayliner Marine Corp. & Brooks, 215 NLRB 12 (Nov. 21, 1974) (emphasis added) (finding that the General Counsel's reliance on rumors and speculative arguments was not sufficient to establish employer knowledge under *Wright Line*); *First Transit, Inc.*, No. 28-CA-22431, 2010 WL 635580 (NLRB Div. Judges Feb. 23, 2010) (refusing to rely on "speculation and conjecture" by the General Counsel that one manager might have informed the decision-maker of the employee's union activities, and finding that "the lack of probative evidence that Respondent was aware of any union activity or support by [the employee] is fatal to General Counsel's attempt to meet its *Wright Line* burden of proof"); *see also Jackson Hosp. Corp. v. NLRB*, 647 F.3d 1137, 1142 (D.C. Cir. 2011) (criticizing the Board's argument as "mere speculation without a jot of evidentiary support in the record"); *Circus Circus Casinos, Inc. v. NLRB*, 961 F.3d 469, 486 (D.C. Cir. 2020) (same).

Moreover, there is no basis to question Capone's credibility. Capone's testimony was consistent throughout the hearing that she did not learn of Roe's pro-Union sympathies or activities, and in fact, that she was surprised when she learned that she was a Union organizer after Roe's discharge.[160] Capone's testimony is further corroborated by other evidence in the record. When informed by Hirkaler on May 24 that the Union was alleging that Roe was terminated because she was a Union organizer, Capone responded by email, saying "OMG, I did not know she was an organizer…"[161]

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[160] Tr. 211 (Capone confirming that she did not know that Roe was a "union supporter" or a "union organizer" during the Union's campaign); Tr. 222-23 (Capone learned about Roe's union activities about two weeks after Roe's termination); Tr. 222 ("I would've never in my life thought that Andrea Roe would've been [a union organizer]").

[161] RE 3 (May 24, 2021 email).

c. *The General Counsel's evidence that Yates was aware of Roe's pro-Union sentiments is insufficient to satisfy its prima facie burden.*

Roe alleged that, sometime in early April 2021, she told Yates that she believed that the technicians "needed" a union because she thought that a union could provide the technicians with "better benefits, better pay, better staffing."[162] However, Roe did not tell Yates if she would vote for the Union, and Yates did not ask.[163] Yates testified that, while he viewed Roe as someone who was considering her options in the Union election, Yates "never thought that she was a [Union] supporter."[164] Indeed, Yates testified that he had no knowledge that Roe was helping organize for the Union, or that she had engaged in any Union activities, and there is no evidence in the record that Yates ever became aware of Roe's organizing activities.[165] Both Roe and Saeli conceded that they had no basis to conclude that Yates was aware of Roe's Union organizing activities.[166]

The General Counsel has not introduced any evidence to call into question Yates' credibility. His testimony remained consistent throughout the hearing that he was not aware of Roe's protected activity.[167] He is no longer employed by the BSCHS, and has no interest in the

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[162] Tr. 55.

[163] Tr. 257 ("I didn't know how she going to be voting").

[164] Tr. 257.

[165] Tr. 257 (Yates confirming that he had "no" knowledge that Roe was "helping to organize for 1199").

[166] Tr. 86; Tr. 23-24.

[167] Tr. 256-57.

outcome of this proceeding.[168] He has also been a member of the Union since 2003.[169] Roe, on the other hand, has an obvious interest in alleging that SACH management knew of her Union activity, as well as the other elements of the General Counsel's case brought on her behalf. Taken together, the General Counsel has failed to introduce sufficient evidence to establish by a preponderance of the evidence that Yates knew of Roe's Union activities and to satisfy the General Counsel's burden under *Wright Line*.

However, even if Yates did have knowledge of Roe's protected activities, the General Counsel cannot rely on such knowledge to establish a *prima facie* case of employer knowledge. It is undisputed that Yates was not involved in the decision to terminate Roe.[170] Therefore his knowledge is irrelevant for purposes of a Section 8(a)(3) claim unless the General Counsel can establish that Yates disclosed this information to the actual decisions-makers who made the decision to terminate Roe. *See Gestamp*, 769 F.3d at 262 ("[t]he employer-knowledge requirement entails [the General Counsel] proving knowledge on the part of the company official who actually made the discharge decision"). Given Yates' testimony that he was not aware of Roe's Union activities or affiliation and Capone's testimony that she did not learn of Roe's protected activities until after her discharge, it would be improper to impute Yates's knowledge of any union activity by Roe to the relevant decision-makers in this case. *See In re The Parksite Grp.*, 354 NLRB 801,

[168] Tr. 248-49 (Yates retired from the WMHS and is now employed as a radiology technician at Garnet Medical Center).

[169] Tr. 250 (Yates has been a member of the Union since 2003).

[170] Tr. 216 (confirming Yates was not at the May 7 meeting and was not involved in the decision to terminate Roe, as "[n]ormally the manager will wait for HR and leadership team to get back to them to let them know [about the discipline imposed]."); Tr. 262 (Yates confirming that he was not "involved at all" in the decision to terminate Roe and was informed of the decision by Capone after it was already made by the decision-makers).

804 n.18 (Sept. 30, 2009) ("A supervisor's knowledge of protected activity can be imputed to upper management ***where the employer does not establish a credible evidentiary basis for rejecting such imputation***.") (emphasis added); *State Plaza, Inc.*, 347 NLRB 755, 756 (2006) (employer may rebut imputation of knowledge by evidence that the direct supervisor "did not pass on this information to higher officials"); *Gestamp*, 769 F.3d at 262 (refusing to impute direct supervisors' knowledge to the decision-maker).

d. *The General Counsel has presented no circumstantial evidence from which employer knowledge can be inferred.*

The General Counsel has not introduced any circumstantial evidence from which knowledge of union activity can be inferred on behalf of the relevant SACH, BSCHS or WMHS decision-makers. This is not a case, for example, where it would be appropriate to infer knowledge based solely on the timing of Roe's May 14 discharge. There is undisputed evidence that the Compliance investigation was initiated on April 28, upon the receipt of a third-party complaint, wholly unrelated to any protected activities. The Board and courts have repeatedly refused to infer knowledge based on timing where another, legitimate intervening event triggered the adverse action. *See In re Cent. Plumbing*, 337 NLRB at 975 (refusing to infer knowledge based on timing of termination where another contemporaneous reason explained the discharge); *Interbake Foods, LLC*, 2013 WL 4715677 (NLRB Div. of Judges Aug. 30, 2013) (refusing to infer knowledge from timing of discharge based on evidence that the discharge was precipitated by misconduct unrelated to union activity); *In re Music Exp.*, 340 NLRB at 1064 (same); *Gen. Mercantile & Hardware Co. v. NLRB*, 461 F.2d 952, 955 (8th Cir. 1972) ("[M]ere coincidence in time between the employee's union activities and his discharge does not raise an inference of knowledge on the part of the employer without some direct or persuasive circumstantial evidence of knowledge.") (citation omitted).

Based on the paucity of any persuasive evidence in the record establishing that the decision-makers knew of Roe's protected activities, the General Counsel failed to meet its *prima facie* burden under *Wright Line*. The Complaint must therefore be dismissed in its entirety.

2. There is no evidence that anti-union animus played any role in Roe's termination.

Even if there was sufficient evidence to prove employer knowledge, the General Counsel has failed to establish that any of the relevant decision-makers exhibited anti-union animus that motivated their decision to terminate Roe. As part of its *prima facie* burden, the General Counsel must prove that the employer had animus towards the protected activity, and the General Counsel's evidence must be "sufficient to establish that a causal relationship exists between the employee's protected activity and the employer's adverse action against the employee." *Tschiggfrie Prop.*, 368 NLRB No. 120 at *11. Evidence of "general hostility" toward the union is insufficient by itself, and will not invariably sustain the General Counsel's *prima facie* burden. *Id.* at *4. The General Counsel has failed to establish anti-union animus in this case.

a. There is no evidence that any of the relevant decision-makers ever expressed anti-union animus.

There is no evidence in the record that any of the relevant decision-makers ever expressed anti-union sentiments or hostility towards the Union or Roe's activities for the Union. The General Counsel has not, for example, introduced evidence of any comments by any of the decision-makers that are critical of or that exhibited hostility towards the Union or Roe's support for the Union. Critically, there is absolutely ***no evidence*** in the record to suggest that Campbell or Molleda—who initiated and conducted the investigation into Roe's misconduct and who determined that Roe breached SACH's HIPPA and unauthorized access policies—ever expressed any anti-union animus. The General Counsel cannot escape the fact that Roe was terminated largely on the

recommendation of the Compliance Department, which was not in any way involved in SACH's response to the Union campaign, after a thorough investigation of a third-party complaint wholly unrelated to Roe's Union activities.[171]

The General Counsel's reliance on Saeli's allegation that Yates asked her to identify the "ringleader" of the Union campaign is misplaced.[172] As a threshold matter, Yates expressly denied ever asking this question.[173] In fact, Yates testified that he "never really cared who the ringleader was" and that he "never really thought about that."[174] Yates has been a Union member since 2003.[175] Moreover, Saeli testified that she did not inform Yates that Roe was involved in the Union organizing effort for the technical employees at SACH.[176] Yates further testified that he had a friendly relationship with Roe, and that he did not want to see her terminated.[177] Even Roe admitted that Yates expressed support for her during the May 4 investigation meetings.[178] These

[171] JE 7; JE 9; JE 14; Tr. 121 (noting that Compliance made recommendations to the leadership team regarding whether a termination was an appropriate form of discipline to impose for a compliance violation).

[172] Tr. 13.

[173] Tr. 254 ("No, that…didn't happen. I never -- I never really cared who the ringleader was. I never really thought about that. No, I never asked her that.").

[174] Tr. 254.

[175] Tr. 250.

[176] Tr. 13-14.

[177] Tr. 254; Tr. 264 (Yates had a "very good" relationship with Roe, thought that she was a "good employee," and had aspirations for her career); Tr. 265 (Yates: "I was sad when she was fired. I mean, I -- that's not the outcome I was hoping for… I didn't want to see her terminated.").

[178] Tr. 85 (Roe confirming that Yates hired Roe and expressed support for her during the May 4 meeting).

facts undercut any inference of animus by Yates towards Roe or her Union activities. Finally, even if Yates had asked Saeli about the "ringleader" of the Union campaign, it is undisputed that he played no role in Roe's termination.[179] Any animus he may have exhibited cannot be imputed to the decision-makers who actually decided to terminate Roe.

Capone was similarly supportive of Roe during the investigation process.[180] Capone testified that she had a good relationship with Roe, that she had known her since 2006, and that she knew her personally, outside of their work relationship at SACH.[181] Further, Capone testified that she did not want to terminate Roe, and that she felt "extremely sick" to her stomach on May 14 because she had to terminate Roe, which she characterized as "very difficult".[182] This is inconsistent with any insinuation that Capone expressed animus towards Roe or her Union activities. Capone's enforcement of the hospital rules not permitting any external visitors due to COVID-19 restrictions on May 14, during Roe's termination meeting, similarly does not support

[179] Tr. 216 (confirming Yates was not at the May 7 meeting and was not involved in the decision to terminate Roe, as "[n]ormally the manager will wait for HR and leadership team to get back to them to let them know [about the discipline imposed]."); Tr. 262 (Yates confirming that he was not "involved at all" in the decision to terminate Roe and was informed of the decision by Capone after it was already made by the decision-makers).

[180] Tr. 94 (Roe confirming that Capone seemed supportive of Roe throughout the investigation).

[181] Tr. 211-12.

[182] Tr. 225-26; *see also* 245 ("I've always looked at [Roe] as a caring…compassionate person…").

an inference of anti-union animus.[183] While Capone asked Shorette to leave due to the COVID-19 restrictions on external visitors, Shorette was permitted to call into the meeting by phone.[184]

b. ***WMHS has a longstanding history of amicable bargaining with unions, including the Union at other WMHS facilities.***

The WMHS, including BSCHS facilities and SACH specifically, have a longstanding history of amicable and successful bargaining with unions, including the Union at other locations, that undercuts any inference of anti-union animus. SACH has entered into three CBAs, two with the Union for the technical and service units, and one with NYSNA for the RN unit.[185] In fact, Roe testified that she initiated her Union activities only after the RNs successfully organized at SACH and encouraged her to "piggyback" off their election.[186] SACH agreed to conduct these union elections, including the Union election for its technical employees, via consent election agreement with the unions, which were approved by the Board.[187] There is no evidence in the record to suggest that SACH ever deviated from the election agreements or that SACH failed to bargain with the Union or NYSNA in good faith.

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[183] Tr. 221 (Capone explaining that she asked Krystal Shorette to leave the premises on May 14 because SACH had policy at the time to not permit any external visitors into the facility due to COVID-19 restrictions).

[184] Tr. 77 ("Before she left, she told me that I could call her and put her on speakerphone so I could still be -- she could still be part of the meeting."); Tr. 221.

[185] Tr. 207; Tr. 252.

[186] Tr. 44-46.

[187] Tr. 115 ("This was a consent election… the parties worked with the Board and 1199 to come up with the unit."); Tr. 208 (Capone confirming that SACH agreed to an election with the Union for the technical employees); GC 8, at SACH0000136-40 (sample consent agreement).

Both the Bon Secours Community Hospital and the Good Samaritan Regional Medical Center also have long-standing collective bargaining relationships with the Union,[188] and both the MidHudson Regional Hospital and the HealthAlliance Hospital now also have unionized workforces.[189] Each of these hospitals are a part of the WMHS, which oversees and coordinates labor relations and collective bargaining for all WMHS facilities.[190] Aside from this proceeding, there is no evidence in the record of any complaint, grievance or unfair labor practice charge alleging that SACH or any other WMHS facility engaged in discrimination or retaliation on the basis of any employee's membership in or participation in union activities, or engaged in any other unfair labor practice.

This evidence of amicable collective bargaining is inconsistent with an inference of anti-Union animus. *See Electrolux Home Prod., Inc.*, 368 NLRB No. 34, at *5 (Aug. 2, 2019) (noting that history of collective bargaining did not reveal any incidents of animosity, which was inconsistent with an inference of anti-union animus); *Columbian Distrib. Servs., Inc.*, 320 NLRB 1068, 1070 (1996) (finding that history of amicable bargaining with union undercut an inference of anti-union animus).[191]

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[188] Tr. 208; *see also* Tr. 49 ("[Anthony Peterson, a Union official] had said that they just got the union -- they had just gotten the union voted in at another hospital close by and now would be a great time to kind of keep that ball rolling and, you know, get going with St. Anthony's.").

[189] Tr. 116; GC 5, at SACH0001170 (noting that the Union represents employees at "Good Sam, Bonn Secours, MidHudson Regional, Health Alliance").

[190] Tr. 121; Tr. 228.

[191] Any attempt by the General Counsel to rely on the flyers distributed during the Union campaign to demonstrate animus would also be misplaced. As an initial matter, the flyers present factual information and do not include any threats, promises or otherwise coercive language in violation of Board law. *See* GC 4, at SACH0000839-41, 844-45 (March 17, 2021 flyers); SACH0000869-71 (March 24, 2021 flyers). The flyers were created by the WMHS labor relations team, in consultation with labor counsel. Tr. 228-29. There is no evidence in the record that any of the

c. *SACH was not engaged in a concerted effort to identify Union supporters.*

During the hearing, counsel for the Union argued that SACH was engaged in a "concerted effort to identify Union supporters," in a strained attempt to make some showing of anti-union animus.[192] The record demonstrates no such thing. The record indicates that employees—not their managers—would occasionally initiate voluntary conversations with their supervisors to advise them of what each employee viewed as potential unionizing activity by some of their co-workers.

On February 16, 2021, Anita Volpe emailed Kim Hirkaler and Patrick Schmincke to advise them that an unnamed technician in the OR Department approached Theresa Krell, a manager in the OR Department, to tell Krell that there was a Union meeting via Zoom.[193] Volpe's purpose for advising Hirkaler and Schmincke appeared to be to ask them if they would like to set up a leadership meeting to discuss how leadership could "educate their staff" on the hospital's position regarding unions.[194] On March 24, 2021, Volpe emailed Hirkaler, Capone and Janet Connery to advise that "[o]ne of the EVS staff reported to their supervisor" that they saw SACH employees, including a Med Surg delegate named Nicole and a Respiratory Therapist named Don Dinsmore, at the Holiday Inn in Chester on Monday mornings, potentially attending a NYSNA meeting.[195]

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relevant decision-makers were involved in creating the message of any of the flyers. Capone's role was limited to making updates to the flyers if instructed to do so—not in crafting the message. *Id*.

[192] *See generally* Tr. 233-45; Tr. 239 (Union counsel arguing that there was a "concerted effort to identify Union supporters").

[193] Tr. 233-34; GC 6, at SACH0000385-86 (Volpe's February 16 email advising that, "Just now, Theresa reported that one of her techs, ***approached her*** that there was an 1199 meeting via Zoom.") (emphasis added).

[194] GC 6, at SACH0000385 (Volpe's February 17 email asking, "Would you like to set up a meeting with our leadership to advise them on how to educate their staff?").

[195] Tr. 235; GC 3, at SACH0000204 (Volpe's March 24 email).

On April 9, 2021, Volpe emailed Hirkaler, Capone and Connery asking whether Volpe should reach out to the managers of certain service employees who may have been involved in union activities to advise the managers on how to appropriately respond to the unionization efforts of service employees in their departments.[196] Capone testified that the service employees listed in Volpe's April 9 email as potential Union supporters were identified by other staff members—not Capone or SACH management.[197]

None of these emails referenced or implicated any union activity by Andrea Roe.[198] There is no evidence to suggest that Roe was ever identified as a possible Union supporter or organizer by her co-workers or management, or that SACH management ever discussed her possible organizing for the Union.[199] At most, the General Counsel has established that SACH managers shared information with other managers about unionizing activities by certain employees that was brought to their attention by other staff members.[200] The record does not support a finding that SACH management was actively searching for and attempting to identify union organizers or

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[196] Tr. 235-37; GC 7, SACH0001083-84 (Volpe's April 9 email).

[197] Tr. 240 (the employees included in Volpe's April 9 email were included based on "information that was brought forward by a staff member" and noting that Capone did not seek to identify union supporters or organizers); *see also* Tr. 237-38 ("I had no interest in trying to identify who was part of the organizing campaign.").

[198] Tr. 239 (Union counsel admitting, "we obviously do not have an email that has been produced to us that says I know Andrea Roe was involved [in union activity]").

[199] *See* Tr. 211 (Capone confirming that she did not know that Roe was a "union supporter" or a "union organizer" during the Union's campaign); Tr. 222 ("I would've never in my life thought that Andrea Roe would've been [a union organizer]"); RE 3 (Capone exclaiming, "OMG, I did not know she was an organizer…"); Tr. 257 (Yates confirming that he had "no" knowledge that Roe was "helping to organize for 1199" and that he did not view Roe as a Union supporter).

[200] *See also* Tr. 244 (employee informed Volpe that Christopher Dickinson was seen at a potential union event).

supporters. Moreover, there is nothing in the record to suggest that SACH or any other WMHS facility ever took any adverse action against any of the employees identified as potential union supporters or organizers due to their union activity or affiliation.

d. *The timing of Roe's termination is insufficient to support an inference of anti-union animus.*

The General Counsel's reliance on the timing of Roe's termination is unpersuasive given that Roe's termination was precipitated by a third-party complaint to WMHS Compliance on April 28, 2021. While the NLRB has found that close proximity between protected activity and an adverse employment action may in certain circumstances support an inference of anti-union animus, the NLRB and courts have consistently ruled that such an inference is improper when the adverse action was also close in proximity to another intervening event unrelated to union activity, such as misconduct, poor performance or another non-discriminatory basis for the adverse action. *See*, *e.g.*, *U.S. Cosms. Corp.*, 368 NLRB No. 21, at *4 (July 8, 2019) (finding no basis for drawing an inference of anti-union animus where timing of discharges was precipitated by misconduct); *Syracuse Scenery*, 342 NLRB 672, 675 (2004) (refusing to infer animus or pretext based on timing of discharges when precipitated by misconduct); *Interbake Foods*, 2013 WL 4715677 (same); *First Transit*, 2010 WL 635580 (declining to infer animus based on timing of terminations when made in conjunction with contemporaneous budgetary cutbacks, unrelated to any union activity).

Here, the record establishes that, while Roe did purportedly engage in Union activity from January – April 2021, the investigation of her HIPPA breach was triggered on April 28, 2021 when Campbell received a complaint from Christine Faline.[201] The General Counsel has not introduced any evidence to suggest that the Compliance investigation was in any way prompted by or related

[201] Tr. 125-27; Tr. 196; JE 5, at SACH0000741.

to her Union activity, other than to suggest a temporal proximity. This is insufficient, by itself, to establish the required nexus under *Wright Line*. *See NLRB v. Webb Ford, Inc.*, 689 F.2d 733, 739 (7th Cir. 1982), *overruled on other grounds* in 712 F.2d 1131 (7th Cir. 1983) ("We are persuaded that the timing of the discharges alone is simply too slender a reed to support the finding of a *prima facie* case of unlawful motivation, and the case does not, therefore, survive the first requirement of the Board's *Wright Line* test."); *Syracuse Scenery*, 342 NLRB at 675 (ruling that timing of discharges, standing alone, was insufficient to establish anti-union animus or pretext); *see also Indep. Residences, Inc.*, No. 29-CA-25657, 2004 WL 2235877 (NLRB Div. Judges Sept. 30, 2004) (timing of discharge not significant, in part, because it was "proximate in time to the event for which she was purportedly terminated").

e. *There is no evidence of disparate treatment of Roe compared to other employees who engaged in similar HIPPA violations.*

The General Counsel has failed to present evidence that Roe was treated differently based on her Union activities or sentiments compared to other SACH or WMHS employees who were disciplined for similar HIPPA violations. During the May 7 meeting, Campbell and Molleda discussed the discipline imposed in prior compliance cases involving serious HIPPA violations, including specifically the termination of Kathy Taylor, who was discharged for similarly serious violations involving both a breach of HIPPA and unauthorized access.[202] HIPPA violations involving both unauthorized access to patient medical records and disclosure of patient protected

[202] Tr. 216-17; Tr. 178 ("So we had a discussion, a review, similar cases that -- whether there was inappropriate access and/or access and disclosure. A few of those cases, we discussed…in instances where there was inappropriate access, these individuals were terminated. We did have an individual, Kathy Taylor, who, I recall -- who also works for the Charity System, who accessed and redisclosed information, and she was terminated, as well. And we discuss[ed] those similar cases when we meet as a group [on May 7].").

heath information are generally treated as more serious because they suggest an intentional disclosure of protected health information.[203] In addition to Roe, SACH and other WMHS hospitals had terminated at least three employees (including Taylor) in the three preceding years for serious HIPPA breach and unauthorized access violations.[204] A chart summary and the comparator discipline documents were introduced into the record as JE 13.

All of the employees who received lesser discipline for HIPPA violations engaged in less egregious conduct, primarily inadvertent disclosure of patient medical information or violations that involved solely unauthorized access or solely a HIPPA breach.[205] During the hearing, the General Counsel incorrectly suggested that another employee, Sarlyn Serwatien, received a written warning for violations involving both unauthorized access and disclosure in violation of HIPPA.[206] Serwatien, however, received a written warning for accessing a medical record that ***did not contain patient protected health information*** and sending it to a family member's physician.[207] Serwatien was disciplined for "improper use of the Hospital's electronic resources for personal use"—not for a HIPPA breach.[208] As such, this violation merited lesser discipline. The General Counsel has

[203] Tr. 179-80 ("So when we have information that points to the fact that there was inappropriate access into a medical record and then redisclosure, then that's considered intentional. And again, we take these things very, very seriously.").

[204] JE 13, at SACH0000073.

[205] JE 13.

[206] Tr. 183-85.

[207] JE 13, at SACH0000069-70.

[208] JE 13, at SACH0000069-70. The chart summary at the front of JE 13 notes that the misconduct included both unauthorized access and inappropriate disclosure, but does not provide the details of the underlying discipline documentation (e.g., that the disclosure was not a HIPPA breach). JE 13, at SACH0000075. The chart was created by counsel to summarize the underlying discipline documentation.

failed to identify any similarly-situated comparators who engaged in a serious HIPPA violation analogous to Roe's misconduct but received a lesser discipline.

In addition, there is no evidence in the record that any other Union supporter or organizer was treated disparately. Saeli admitted that, despite her pro-Union comments to Yates, she was never "disciplined or subject to any adverse treatment."[209] Capone noted that she believed that Christopher Dickinson, another radiology technician, was involved in Union organizing efforts throughout the Union campaign, but Dickinson was never subject to any adverse employment action.[210] Capone was aware that Don Dinsmore, a respiratory therapist, was seen in the vicinity of a NYSNA meeting,[211] but Dinsmore was not subject to any adverse employment action and, in fact, was recently promoted.[212] She also believed that Cathy Moore, a service employee, may have been one of the Union organizers during the Union's campaign to organize the service workers at SACH, but Moore was never subject to any adverse employment action and is still employed at SACH.[213] None of the other individuals referenced in Volpe's emails as potential union supporters, as identified by their co-workers, were subject to any adverse employment action or disparate treatment based on their union activities. Similarly, there is nothing in the record to

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[209] Tr. 23.

[210] Tr. 224-25.

[211] GC 3, at SACH0000205.

[212] Tr. 245-46.

[213] Tr. 241-42; Tr. 245-46.

suggest that any of the other technicians who supported and voted for the Union were treated disparately compared to employees who did not engage in Union activities.[214]

The General Counsel has failed to demonstrate that Roe's termination was in any way motivated by Roe's union activity. Roe was treated the same as other employees who committed serious HIPPA violations. This is fatal to the General Counsel's attempts to satisfy the animus prong of its *prima facie* case. *See Tschiggfrie Prop.*, 368 NLRB No. 120, at *11 (the General Counsel's *prima facie* evidence must be "sufficient to establish that a causal relationship exists between the employee's protected activity and the employer's adverse action against the employee").

f. *The General Counsel has presented no other evidence that supports an inference that anti-union animus motivated Roe's termination.*

The General Counsel dedicated considerable time during the hearing to questioning the thoroughness of the Compliance Department's investigation of Roe's HIPPA violations, presumably in an attempt to establish that the investigation was pretextual. But the General Counsel cannot rely on evidence of pretext alone to satisfy its *prima facie case* burden under *Wright Line*. *See Electrolux*, 368 NLRB No. 34, at *4-7. In *Electrolux*, the Board affirmed the ALJ's finding that the employer's stated reasons for the termination were pretextual, but nonetheless ruled that the general counsel failed to meet its *prima facie* burden under *Wright Line* because the surrounding circumstances did not support an inference that employees' protected activities motivated the adverse employment action. *Id*. at *6-7. Specifically, the Board found that it was unlikely that the protected activity motivated the termination because it was too remote

[214] Tr. 56-58 (noting that the Union received a majority of the votes of the technical unit at the April 30 ballot count).

in time, and because countervailing evidence of good faith bargaining undercut an inference of anti-union animus. *Id*. at *7. In other words, the general counsel's evidence of pretext did not make up for its failure to establish that anti-union animus actually motivated the termination. *Id*.; *see also Valmont Indus., Inc. v. NLRB*, 244 F.3d 454, 466 (5th Cir. 2001) ("An ALJ may not rest its entire decision that antiunion animus motivated an employee's discipline on a finding that the employer gave a pretextual reason for its action."); *Union-Trib. Pub. Co. v. NLRB*, 1 F.3d 486, 491 (7th Cir. 1993) (an ALJ "may not rest its entire decision" on pretext).

Like in *Electrolux*, the General Counsel in this proceeding cannot meet its *prima facie* burden by simply casting doubt on SACH's rationale for Roe's termination, either by second-guessing Compliance's investigation of Roe's HIPPA violations or by some other evidence of pretext. It must prove that anti-union animus motivated Roe's termination. *See Tschiggfrie Prop.*, 368 NLRB No. 120, at *8-9 (the general counsel's evidence "must be sufficient to establish that a causal relationship exists between the employee's protected activity and the employer's adverse action against the employee"). The record does not support such a finding.

C. SACH Would Have Terminated Roe for Non-Discriminatory Reasons Even in Absence of Her Union Activity.

Even if the General Counsel could establish a *prima facie* case showing that Roe's Union activity was a motivating factor in SACH's decision to terminate her employment, the General Counsel's termination claims must fail because SACH has demonstrated, through a preponderance of the evidence, that it would have terminated Roe for reasons completely unrelated to her Union activity. It is well established that an employer may rebut the General Counsel's *prima facie* case by demonstrating that it would have taken the same action "even in the absence of the protected conduct." *Tschiggfrie Prop*., 368 NLRB No. 120, at *8 (citing *Wright Line*, 251 NLRB at 1089). "An employer may typically meet this burden by demonstrating that its decision was based on a

'good-faith belief'" that its business decision was warranted, regardless of whether the decision was reasonable under the circumstances. *See Cp Anchorage Hotel 2, LLC, d/b/a Hilton Anchorage*, 369 NLRB No. 92 (May 29, 2020) (explaining that the relevant inquiry is whether the employer's decision was "based on a good-faith belief" that the employee engaged in misconduct, and that whether the employee actually engaged in the alleged misconduct was "irrelevant to the merits of the case"); *Ryder Distribution Res.*, 311 NLRB 814, 816 (1993) ("the crucial factor is not whether the business reasons cited by [the employer] were good or bad, but whether they were honestly invoked and were, in fact, the cause of the change") (citation omitted); *Berry Sch. v. NLRB*, 653 F.2d 966, 971 (5th Cir. 1981) (finding that the "only relevant question" was whether the decision-maker had a good-faith belief in her rationale for issuing a negative performance evaluation, regardless of whether the rationale was reasonable or supported by sufficient facts).

As long as SACH's rationale for terminating Roe was not based on her protected activity, SACH had the right to terminate Roe, who was an at-will employee, "for a good reason, bad reason, or no reason at all." *See Circus Circus Casinos*, 961 F.3d at 482 ("It is well recognized that an employer is free to lawfully run its business as it pleases. This means that an employer may discharge an employee for a good reason, a bad reason, or no reason, so long as it is not for an unlawful reason.") (citation omitted); *Springfield Day Nursery*, 362 NLRB 261, 281 (2015) ("Absent a showing of antiunion motivation, an employer may discharge an employee for good reason, a bad reason, or no reason at all without violating the Act"). "Neither Board nor Court can second-guess [management] or give it gentle guidance by over-the-shoulder supervision." *Berry*, 653 F.2d at 971 (citations omitted). "[Management] has, as the master of its own business affairs, complete freedom with but one specific definite qualification: it may not [take adverse action] when the real motivating purpose is to do that which [the NLRA] forbids." *Id.*

SACH has satisfied its burden to demonstrate that Roe would have been terminated in the absence of her union activity at SACH, based on Faline's April 28 complaint and the findings of the investigation completed by the Compliance Department.[215] There is absolutely no evidence in the record linking the investigation to Roe's protected activity. It is undisputed that the investigation was initiated and conducted by the WMHS Compliance Department, which had no role in SACH's labor relations, immediately after receiving a third-party complaint from Faline on April 28, 2021.[216] The HIPPA access audit was generated by the IT department and analyzed by Molleda and Campbell before any other members of management were notified of the investigation on May 4.[217] There is nothing in the record to suggest that Faline, Campbell or Molleda were motivated by anti-union animus, or that they were aware of Roe's Union activities. Moreover, Campbell received the complaint from Faline on April 28, two days before Roe participated in the April 30 ballot count video call during which the General Counsel claims (absent any proof) that Capone learned of Roe's support for the Union.[218]

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[215] JE 14 (Compliance summary of investigation into Roe's HIPPA violations).

[216] Tr. 125-27; Tr. 196; JE 5, at SACH0000741 (April 28 email summarizing Faline complaint made to Campbell over the phone on April 28); JE 8 (April 28 request for HIPPA access audit); JE 14 (Compliance summary of investigation into Roe's HIPPA violations); JE 7 (final July 6 Compliance memorandum).

[217] Tr. 125-35; JE 5, at SACH0000741 (Campbell's April 28 email requesting that Moleda open a Compliance case after receiving Faline complaint); JE 8 (Molleda's April 28 request for HIPPA access audit); JE 17 (Molleda first contacted Yates on May 4, after reviewing the HIPPA access audit).

[218] JE 5, at SACH0000741 (April 28, 2021 email summarizing Faline complaint made to Campbell over the phone on April 28); Tr. 56-57 (Roe participated in the video call ballot count on April 30, 2021).

The General Counsel has presented no evidence to suggest that Campbell or Molleda did not have a good faith belief that Roe committed the HIPPA violations when they determined that Roe inappropriately accessed the Patient's medical records and disclosed protected health information to her mother-in-law, or when they recommended Roe's discharge during the May 7 teleconference.[219] Similarly, there is no evidence that any of the other decision-makers who agreed with Compliance's recommendation that Roe should be terminated during the May 7 call lacked a good-faith belief that Roe committed the HIPPA violations, or that any of these decision-makers were motivated by anti-union animus. Indeed, Capone did not want to terminate Roe, and expressed support for Roe throughout the May 4 investigation meetings.[220] Whether the decision to terminate Roe based on the investigation conducted was reasonable under the circumstances, or whether Compliance could have reviewed additional information during its investigation, is irrelevant. *See Hilton Anchorage*, 369 NLRB No. 92 (the relevant inquiry is whether the employer's decision was "based on a good-faith belief" that the employee engaged in misconduct); *Ryder Distribution Res.*, 311 NLRB at 816 (same); *Berry*, 653 F.2d at 971 (the only relevant question is whether the decision-maker had a good-faith belief in the rationale for the adverse action, and it is not the Board's role to "second-guess" management decisions or provide "over-the-shoulder supervision"); *Circus Circus*, 961 F.3d at 482 ("an employer may discharge an

[219] JE 14 (documenting Molleda's and Campbell's determination that Roe "inappropriately accessed the patient's medical record on 4/25/21" without a "business/clinical reason" and their belief that Roe disclosed the Patient's protected health information to Donna Roe); Tr. 160 (Campbell and Molleda recommended that Roe be terminated during the May 7 teleconference); Tr. 121 (Compliance makes recommendations on the appropriate discipline if Compliance determines that a violation occurred).

[220] Tr. 177-78, Tr. 211-12; Tr. 225-26 (having to terminate Roe was "very difficult" for Capone and made her "extremely sick" to her stomach).

employee for a good reason, a bad reason, or no reason, so long as it is not for an unlawful reason."); *Springfield Day Nursery*, 362 NLRB at 281 (same).

This is not a case where the employer failed to conduct any meaningful investigation into the allegations, ignored contravening evidence, or failed to give the employee an opportunity to explain their conduct. *Cf. New Orleans Cold Storage & Warehouse Co., Ltd.,* 326 NLRB 1471, 1477 (1998) (failure to conduct a meaningful investigation suggested pretext); *Rood Trucking Co., Inc*., 342 NLRB 895, 899-900 (2004) (employer's investigation supported an inference of pretext because it "ignored aspects of what it knew and miscalculated what it did not bother to investigate"). Molleda and Campbell reviewed and considered a breadth of information throughout the investigation. They relied on a detailed HIPPA access audit prepared by IT that indicated Roe had accessed the Patient's medical records on the morning of April 15 without any apparent involvement in the Patient's care.[221] They reviewed Roe's access to the medical records of other patients, to identify the types of documents that Roe regularly needed to access during the regular scope of her duties.[222] Molleda and Campbell also reviewed the various radiology imaging orders and tests conducted for the Patient around the time that Roe accessed the Patient's medical chart to attempt to identify a legitimate reason why Roe may have accessed the Patient's records.[223]

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[221] JE 1 (HIPPA access audit); Tr. 129-31.

[222] Tr. 158 ("We reviewed her access of that day with the IT department and had a little bit of discussion with them to just take a look at her patterns of access and the types of things that she accessed."); JE 7 (noting that there was a pattern of regular access to patient records by Roe on April 15 and that the only "outlier" was Roe's access to the Patient's chart).

[223] Tr. 131-32; Tr. 140; JE 2 (List of radiology orders and tests conducted for the Patient around the time of Roe's access to Patient's records and Molleda's hand-written notes indicating that Roe was not on duty at the time that the most recent test was conducted for the Patient from 2:25-2:40 AM on April 15).

After concluding that these records did not indicate Roe's involvement with any contemporaneous imaging orders, Molleda consulted with Yates to confirm that Roe was not involved in the Patient's care.[224]

Molleda and Campbell both spoke with Faline, who provided a thorough accounting of Faline's conversation with Donna Roe on April 27.[225] Faline provided Campbell and Molleda with damning details, including that Donna Roe said that her daughter-in-law, Andrea Roe (who she identified by name and as an x-ray tech at SACH), kept her updated on the Patient's status, that the Patient had COVID-19, and that the Patient had been transferred from SACH to WMC.[226] These details are so specific that they suggest Donna Roe learned about the Patient's protected health information from someone intimately familiar with his medical care.[227] Finally, Molleda and Campbell gave Roe multiple opportunities on May 4 to provide an explanation for her access to the Patient's records on April 15, but she was unable to do so.[228] Roe was only able to provide hypothetical scenarios and speculations for why she might have accessed the Patient's records, but was unable to provide any details to exculpate her suspicious access on April 15.[229] Taken

[224] Tr. 136, 139-40; JE 17.

[225] Tr. 125-27; Tr. 192-96; JE 5, at SACH0000741.

[226] Tr. 125-27; Tr. 192-96; JE 5, at SACH0000741.

[227] Compliance did not interview Donna Roe, in accordance with Compliance's practice of generally interviewing only current employees of WMHS facilities. Tr. 174-75. It is telling that the General Counsel opted to not call Donna Roe as a witness in support of the case brought on her daughter-in-law's behalf.

[228] Tr. 63 ("I said I don't remember."); Tr. 90 ("I said I didn't even know if I had [accessed Patient's medical records], but if I had, I couldn't remember why").

[229] Tr. 15; Tr. 63-64; JE 9, at SACH0000706-08 (May 4, 1:00 pm meeting summary); Tr. 75 ("I said, I could not remember specifically, like, who called me that day or why I had to click into [the Patient's record on April 15].").

together, these facts do not support a conclusion that Compliance's investigation of Roe's alleged HIPPA breach was a sham or pretext for an unlawful motive.

Roe's denial of the alleged HIPPA violations is not credible.[230] Faline provided compelling and detailed testimony describing her conversation with Donna Roe on April 27.[231] Faline testified that Donna Roe unequivocally stated that her daughter-in-law, Andrea Roe, "an X-ray tech at St. Anthony's," was keeping her updated on the Patient's medical status.[232] Faline has no interest in the outcome of this proceeding, and no reason to fabricate such a conversation. The General Counsel offered no evidence to call Faline's testimony into question.[233] Roe could not provide a cogent explanation for why her mother-in-law would have told Faline that Roe was keeping her apprised of the Patient's medical condition.[234] Roe's allegation that she did not ask her mother-in-law about the April 27 conversation with Faline until after she was terminated, and that Donna Roe denied ever making these statements, is also not credible.[235] Indeed, it is telling that the General Counsel did not call Donna Roe as a witness to corroborate Roe's claims, given Roe's

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[230] Tr. 61-62 (Roe denying that she disclosed the Patient's protected health information to her mother-in-law).

[231] Tr. 192-93.

[232] Tr. 193.

[233] Both the General Counsel and the Union declined to question Faline on cross-examination. Tr. 204.

[234] JE 9, at SACH0000707 (Roe claiming that her mother-in-law must have misspoke or made up the story because she loves telling people that Roe worked at SACH).

[235] Tr. 89 (Roe insisting that she did not ask her mother-in-law about the comment until after her termination, and alleging that Donna Roe denied making the statement); *see also* Tr. 96 (Roe claiming she did not ask Donna Roe about the statement to maintain confidentiality of the investigation).

allegation that her mother-in-law denied making the comments to Faline on April 27. It is more likely that, when presented with Faline's complaint and evidence of her unauthorized access to the Patient's records, Roe opted to categorically deny all wrongdoing despite her inability to provide any explanation for the alleged HIPPA violations.[236]

In light of the thorough Compliance investigation of Roe's HIPPA violations, which was initiated by a third-party complaint and was wholly unrelated to Roe's Union activities, SACH has met its burden to establish that Roe would have been terminated even in the absence of union activity.

D. Yates Did Not Interrogate Any Employees About their Union Activities in Violation of Section 8(a)(1).

In addition to its termination claims, the General Counsel also alleges that Yates interrogated employees about the union activities of other employees in violation of Section 8(a)(1).[237] The Board has ruled that managers may not interrogate employees about their union or other concerted activities if the manager's comments or conduct "would reasonably tend to interfere with, restrain, or coerce employees in the exercise of their [Section 7 rights]" under the totality of the circumstances. *Stabilus, Inc.*, 355 NLRB 836, 849 (2010) (*citing Rossmore House*, 269 NLRB 1176 (1984)). The Board evaluates Section 8(a)(1) interrogation claims on a case-by-case basis, considering a variety of factors, including considering (1) whether the employer has a history of hostility toward or discrimination against union activity; (2) the nature of the information

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[236] Tr. 75 ("I said, I could not remember specifically, like, who called me that day or why I had to click into [the Patient's record on April 15]."); Tr. 90 ("I said I didn't even know if I had, but if I had, I couldn't remember why [I had accessed these records]"); Tr. 142 (confirming that Roe had no explanation for why she accessed these specific portions of the Patient's medical chart).

[237] GC 1(c), ¶ 6. Section 8(a)(1) prohibits employers from making statements that interfere with, restrain, or coerce employees in the exercise of their rights under Section 7 of the NLRA.

sought (e.g., whether the interrogator appears to be seeking information on which to base an adverse employment action); (3) the seniority and power of the interrogator; (4) the place and method of the interrogation; (5) the truthfulness of the interrogated party's reply and (6) whether the interrogated employee is an open and active union supporter. *Id.*; *Camaco Lorain Mfg. Plant*, 356 NLRB 1182 (2011) (citing *Bourne v. NLRB*, 332 F.2d 47, 48 (2d Cir. 1964)). "[E]ither the words themselves, or the context within which they are used, must suggest an element of interference or coercion." *Stabilus*, 355 NLRB at 849.

Yates engaged in weekly, voluntary discussions with any technical employees who wanted to discuss the Union throughout its campaign at SACH in March to early April 2021.[238] About once a week, he would ask employees if they wanted to talk about the Union and hand out weekly flyers that communicated management's position regarding the Union's campaign.[239]

In early April 2021, on the last day that management was permitted to speak to employees about the Union, Yates informed the technicians that he was available to discuss the Union if anyone was interested.[240] Roe and another technician, Karen Heller, told Yates that they wanted to talk about the Union and joined him in the CAT scan room to discuss.[241] Yates began the

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[238] Tr. 95; Tr. 252-54.

[239] Tr. 54-55 (Yates would inform employees he was available to discuss the Union if they wished); Tr. 274 (Yates explaining that he "brought the [flyers] to each department, ultrasound. And then, if somebody were tied up, I would -- I would make sure I dropped the document off and just say, if there's any questions, let me know."); Tr. 274 (Yates handed out flyers and had voluntary discussions approximately once a week during the Union campaign).

[240] Tr. 54 ("I remember Bob [Yates] going around and saying today's the last day, you know, that we're allowed to talk to you about the union. Does anybody want to talk, does anybody want to talk."); Tr. 55.

[241] Tr. 54-55; Tr. 95 ("[Yates] had said, like, you know, do you want to talk about the Union? I said I would talk about the Union.").

conversation by asking "what do you want to talk about?", and Roe asked him for his opinion on the Union.[242] Yates opined that he thought SACH "was better off…negotiating directly with the employees" and that SACH "preferred that the hospital remain Union free."[243] Yates testified that he made sure that all of his comments were "within the boundaries of the dos and don'ts" on which he was trained by SACH.[244] Although Roe allegedly told Yates that she disagreed with his views, and that she felt that the Union was needed because it might help the technicians obtain additional pay and benefits, Roe testified that "in the end of the conversation, we basically agreed to disagree."[245] Yates made no promises or threats during the discussion.

Nothing about this conversation would tend to coerce, restrain or interfere with employees' Section 7 rights. Roe testified that the conversation was completely voluntary, that she and Heller volunteered to talk with Yates about the Union, and that Yates started the conversation by asking them what they wanted to discuss.[246] Yates did not ask about any employee's Union activities or sympathies, or how any employee would vote in the election.[247] Rather, he simply shared his

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[242] Tr. 95 ("He had said, like, you know, do you want to talk about the Union? I said I would talk about the Union. So I said, you know, what are your -- he said, what do you want to talk about? And I said, well, you know, what are -- what do you want to talk about?").

[243] Tr. 252; Tr. 271.

[244] Tr. 271-72; GC 7, at SACH0001100-06 (Do's and Don'ts in a Union Organizing Drive handout distributed to managers).

[245] Tr. 95-96.

[246] Tr. 54-55.

[247] Tr. 257 ("I didn't know how [Roe] going to be voting"); Tr. 257 (Yates "viewed [Roe] as someone who was considering options,… [but he] never thought that she was a supporter"); Tr. 257 (Yates confirming that he had "no" knowledge that Roe was "helping to organize for 1199").

opinion when asked and gave Roe and Heller an opportunity to share their views.[248] Indeed, Heller elected to remain silent during the discussion.[249] Roe testified that she freely and openly shared her views with Yates, "agreed to disagree," with no indication that she was afraid to be honest or forthcoming.[250] Moreover, Yates and Roe had a good relationship, had known each other for years, and talked often at work.[251] Yates hired Roe, and was her direct, line supervisor.[252] Further, there is nothing in the record to suggest that Yates or SACH had a prior history of hostility towards union activity. Each of these factors indicates that Yates' conversation with Roe did not violate Section 8(a)(1). *See Stabilus, Inc.*, 355 NLRB at 849; *Rossmore House*, 269 NLRB 1176; *Camaco Lorain Mfg. Plant*, 356 NLRB 1182 (2011).

Yates also had multiple voluntary, friendly conversations about the Union with Jeanne Saeli in March-April 2021.[253] They discussed topics ranging from union dues, salary and wages, and the culture of the organization.[254] Saeli alleged that she told Yates that she believed that the Union "would be a very good thing for us" and that, throughout her conversation with Yates, she

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[248] Tr. 95; Tr. 252; Tr. 271.

[249] Tr. 55-56 (confirming Heller did not say anything during the conversation, and that "[s]he pretty much remained quiet and just would maybe nod her head in agreement with some of the stuff I said. But she didn't really talk.").

[250] Tr. 95-96.

[251] Tr. 84-85 (Yates and Roe had worked together a long time); Tr. 264 (Yates had a "very good" relationship with Roe, thought that she was a "good employee," and had aspirations for her career).

[252] Tr. 43 (Yates was Roe's direct supervisor); Tr. 84-85 (Yates hired Roe).

[253] Tr. 253-54. Yates and Saeli had a "friendly relationship" and spoke frequently. Tr. 254; Tr. 23 (Saeli confirming that she had "a good relationship" with Yates).

[254] Tr. 254.

got the impression that Yates was "not a fan" of the Union.[255] Saeli further alleged that, during one conversation in April 2021, Yates asked her "who the [Union] ringleader was."[256] Yates denied that he ever asked Saeli about the "ringleader" of the Union campaign, and testified that he "never really cared" or thought about who led the Union organizing campaign .[257] Saeli alleged that, while she believed that Roe led the Union organizing effort for the technical employees, she did not tell Yates because she "didn't want to get her in trouble."[258]

Yates was a more credible witness than Saeli. His account of his voluntary conversations with employees was consistent with Roe's testimony, which, as detailed above, indicated that Yates made no coercive or unlawful remarks during his discussion with Roe and Heller. Yates has since retired, is no longer employed by the BSCHS, and has been a Union member since 2003.[259] He has no interest in the outcome of this proceeding, and testified that he was unhappy that Roe was terminated on May 14.[260] Roe testified that Yates was supportive of her throughout the investigation process.[261] Saeli, however, admitted that she and Roe were "friends" and had

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[255] Tr. 13.

[256] Tr. 13.

[257] Tr. 254 ("No, that…didn't happen. I never -- I never really cared who the ringleader was. I never really thought about that. No, I never asked her that.").

[258] Tr. 13-14.

[259] Tr. 248-49 (Yates retired from the WMHS and is now employed as a radiology technician at Garnet Medical Center); Tr. 250 (Yates has been a member of the Union since 2003).

[260] Tr. 265 (Yates: "I was sad when [Roe] was fired. I mean, I -- that's not the outcome I was hoping for… I didn't want to see her terminated.").

[261] Tr. 85 (Roe confirming that Yates hired Roe and expressed support for her during the May 4 meeting).

worked together for 14 years.[262] She had an incentive to provide testimony helpful to Roe. Given Yates' express denial that he never asked about the "ringleader" of the Union campaign, there is nothing in the record to warrant a finding that Yates interrogated employees in violation of Section 8(a)(1).

CONCLUSION

For the reasons detailed above, the record does not demonstrate that St. Anthony Community Hospital committed any unfair labor practices in violation of the National Labor Relations Act. The Respondent respectfully requests that the Administrative Law Judge enter an order dismissing the entirety of the allegations in the Complaint with prejudice.

Dated: May 5, 2021

Respectfully submitted,

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[262] Tr. 24; Tr. 60-61 (Roe explaining that she asked Saeli to join her in the May 4 meetings because she thought that Saeli was "the most trustworthy" co-worker working that day).

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **Post-Hearing Brief of Respondent St. Anthony Community Hospital** is being filed electronically and served on all parties of record via the E-Filing system on the National Labor Relations Board's website and that a copy of the foregoing document is being served via electronic mail, on this 5th day of May, 2022, on counsel of record, as follows:

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